SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 384

CORNELL STEAMBOAT COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND NATIONAL WATER CARRIERS ASSOCIATION, INC.

No. 385

BOSTON TOWBOAT COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND NATIONAL WATER CARRIERS ASSOCIATION, INC.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CORNELL STEAMBOAT COMPANY, Plaintiff,

against

UNITED STATES OF AMERICA, Defendant

PETITION—Filed April 2, 1943

I

Jurisdiction of this Court is invoked under the provisions of U. S. C. Title 28, Sections 41(27)(28) and 43-48 inclusive.

II

Plaintiff, Cornell Steamboat Company, is a corporation organized and existing under the laws of the State of New York, with its principal office at 22 Ferry Street, Kingston, N. Y., and is a resident of this judicial district. It is engaged in business as an independent tower, furnishing towage services for hire, by its fleet of tugboats.

III

Plaintiff hereby sues to enjoin, set aside, suspend and annul a certificate and order of the Interstate Commerce [fol. 3] Commission dated February 2, 1943, and effective from and after May 11th, 1943, wherein the Commission certified that public convenience and necessity requires the continuance of operation by Cornell Steamboat Company as a common carrier by water by towing vesels in the performance of towage of non-self-propelled freight-carrying vessels upon certain waters therein specified, in interstate or foreign commerce, and ordered that plaintiff be authorized to perform the said towage services, as a carrier, under the said certificate, subject to the orders, rules, and regulations of the Commission. A copy of said certificate and order is annexed hereto, marked Exhibit E.

IV

The evidence before the Commission showed that plaintiff's business is solely that of furnishing towage services,

under contract, as an independent tower; that it does not carry any cargoes or passengers upon its tugs; that it does not own or operate any carrying vessels; and that it does not enter into any contracts for the carriage of merchandise, property, or passengers.

V

The evidence before the Commission showed that plaintiff's towage services are rendered, under contract, by its tugs, to barges, scows, and similar types of vessels which carry cargoes either on deck or below deck; that the tugs merely attach their towing lines to the vessels to be towed and move them between points as directed by the owners or operators of those vessels; that each vessel towed has its own captain or crew on board, and the plaintiff's employees have nothing to do with the care of cargoes on those [fol. 4] vessels; that the vessels towed, and the cargoes on them, remain in the possession and custody of the owners or operators of those vessels at all times (through their own captains and crews), and there is no bailment of said vessels and their cargoes to the plaintiff.

VI

The evidence before the Commission showed that plaintiff does not issue any bill of lading or similar document for any cargoes on the vessels towed, and has no arrangement (or contract) with anybody except the towage contracts with the owners or operators of the said vessels: that it has no direct or indirect interest in, and many times has no knowledge of the character of, the caroges on the vessels towed, or the origin or final destination of those cargoes; that its responsibility, which is that of a tower, begins when the vessel is taken in tow by its tugs and ends when the tow is left at the agreed destination; that it has nothing to do with the contractual arrangements between the carrier (barge-owner) and the cargo owner as to any forwarding (or delivery) of the cargo; and, that it takes no part in, has no direct or indirect interest in, and no knowledge of the arrangements between the owners of the cargoes and the carriers (barge-owners), either with respect to freight rates or with respect to any other terms of their contracts of carriage.

VII

The evidence before the Commission showed that plaintiff's charges for its towage services are agreed on in its private contracts with the owners or operators of the towed vessels, are in no way dependent upon, or related to, the [fol. 5] freight moneys between those vessels and their cargoes, are direct charges against its customers (the barge-owners) under its contracts with them, and are secured by maritime liens against the vessels towed—not against their cargoes: that in the contracts between the plaintiff and its customers (the barge-owners), the agreed towage charges depend upon the size of the vessel towed and her carrying capacity, because "the larger the unit, the smaller the rate", but the volume, character, or weight of the cargo is of no other concern to the plaintiff: that the towage services can be furnished, if required, to a single vessel at one time, but will then cost the customer more than if several vessels are towed along the river together in a fleet: and that the plaintiff is not a party to any contract of carriage by sharing in any freight moneys as compensation for its towage services.

VIII

The evidence before the Commisison showed that plaintiff's towage services are performed on the Hudson River between Waterford, N. Y., and New York, N. Y., and upon the waters of New York Harbor or the waters surrounding New York City: that the services on the Hudson, north of New York City, are temporarily suspended each winter during those varying periods when the river is closed by ice: that over ninety-five per cent. (95%) of its towage services are furnished between points in the State of New York, including services between New York City and points in New York State on the Hudson River: and that the balance is furnished between points in New York and points in New Jersey on the lower end of the Hudson or the adjacent waters of New York Harbor.

[fol. 6] IX

The evidence before the Commission showed that plaintiff does not advertise its towage services generally and no public schedules of its towing charges are published, the charge in each instance being arranged by private contract

according to the character and extent of the services involved; that plaintiff does not hold itself out to perform towage services, except upon its own terms and for customers of its own choosing: and that it frequently refuses to furnish its towage services except on condition that the owner or operator of the vessel towed contract to release the plaintiff and its tugs from all damages even though the damages result from negligence in the performance of the towage.

X

Plaintiff's towage services have been, and are, contracted and performed under the established law that an independent tower, like the plaintiff, is not a common carrier, is not engaged in the business of a carrier at all, and is free to contract for performance of its towage services upon its own terms, including freedom to contract against liability for negligence; and plaintiff does not hold itself out for the performance of any contracts of carriage as a common, or contract, or private carrier.

XI

Congress, in an Act known as "The Transportation Act of 1940", approved September 18th, 1940 (54 Stat. 952), amended the Interstate Commerce Act and empowered the [fol. 7] Interstate Commerce Commission to regulate carriers by water, in interstate commerce. Congress, in Part III of that Act, relating to water carriers, specifically defined and limited the methods of such regulation and the powers delegated to the Commission. The said provisions expressly relate solely to "carriers". The powers and duties of the Commission (Section 304 *sequi*), such as the classification of carriers, inquiries into rates, establishment of new rates, etc., are plainly and unqualifiedly limited to common or contract carriers,—i. e., persons engaged in the business of carriers.

Section 309 of Part III provides that no common carrier by water shall engage in transportation without the Commission's certificate of public convenience and necessity, and that no person shall engage in the business of a contract carrier by water without the Commission's permit authorizing such operation: and paragraphs (a) and (f) of Section 309 expressly provide for the issuance of certificates or permits to persons who were in *bona fide* operation as com-

mon carriers or contract carriers on January 1, 1940. Thus, in every detail, the Commission was empowered solely to regulate persons engaged in the business of carriers, and no other persons were made subject to Part III of the Act relating to water carriers.

Nowhere in Part III did Congress give to the Commission any authority to put into the category of carriers persons who are not carriers. And Congress did not include any provisions in Part III to change the established law that an independent tower, like the plaintiff, is not a carrier.

Moreover, Congress did not direct or authorize the Commission to regulate water carriers on the same basis, or under the same rules, that the Commission had previously applied to rail carriers, but expressly stated, in the pre-
[fol. 8] amble to the said Transportation Act of 1940, the intent that the Act be so administered "as to recognize and preserve the inherent advantages" of each different form of transportation. And in Part III, relating to water carriers, Congress did not adopt the definition of interstate commerce which it applied to rail carriers or motor carriers, but defined it to mean "transportation of persons or property wholly by water from a place in a state to a place in any other state, whether or not such transportation takes place wholly in the United States." [Section 302 (i) (1).]

XII

After the Transportation Act of 1940 became effective, the Commission, through its Bureau of Water Carriers, gave notice of its intention to regulate independent towers, under Part III, as carriers or as persons engaged in the business of carriers. Plaintiff, believing that intention to be contrary to law, and wishing to determine the issue and to avoid being charged by the Commission with violation of the law, filed with the Commission an application for a permit to engage in the business of a contract carrier, without prejudice to, and expressly reserving, plaintiff's contention that it is not engaged in the business of a carrier and is not subject to the Act; and thereupon presented to the Commission a petition to dismiss the application, on the same grounds.

The said application was filed with the Secretary of the Interstate Commerce Commission on May 21st, 1941. A

photostatic copy will be furnished to the Court upon the final hearing hereof.

Immediately upon the filing of the aforesaid application, and on May 21, 1941, plaintiff filed with the Secretary of the [fol. 9] Interstate Commerce Commission its petition for an order dismissing the application. A copy of said petition is annexed hereto as Exhibit A.

XIII

On October 3, 1941, the testimony of plaintiff's president, Frederick Coykendall, Esq., was taken before Examiner Wilkins, describing in detail the nature of the towage business of the plaintiff, and no testimony was offered by the defendant to rebut or contradict the plaintiff's testimony. Thereafter, on or about January 15, 1942, Examiner Wilkins filed his proposed report, which included his detailed findings of the business in which plaintiff is engaged, as summarized in the preceding paragraphs of this petition. A copy of his proposed report is annexed hereto, marked Exhibit B.

XIV

Plaintiff's exceptions to the Examiner's proposed report were heard on March 12, 1942, by Commissioners Porter, Mahaffey, and Miller, sitting as Division 4 of the Commission. Thereafter, on June 15th, 1942, Division 4 filed its opinion, and the Commission's certificate and order based thereon. Copy of the opinion, certificate, and order, is annexed hereto, marked Exhibit C.

In its opinion, Division 4 concluded that an independent tower, such as the plaintiff, is engaged in the business of a carrier and that plaintiff has held itself out to the public as a common carrier. It also concluded that plaintiff's towage services between New York City and other points in the State of New York on the Hudson River are interstate commerce, because of the fact that tows between those points [fol. 10] may pass through waters of the westerly side of the lower Hudson within the geographical boundary limit of the State of New Jersey.

XV

On August 10th, 1942, on plaintiff's application, the Commission entered an order for a re-argument, and the

re-argument was heard by the Commission on October 21st, 1942, with nine Commissioners sitting, to wit: Commissioners Aitchinson, Lee, Porter, Miller, Mahaffie, Patterson, Splawn, Aldredge and Johnson.

On or about March 1st, 1943, the Commission released its opinion on reargument, dated February 2nd, 1943, affirming the findings and conclusions of Division 4 that the plaintiff, as an independent tower, is engaged in the business of a common carrier, and that plaintiff's towage services between New York City and other places in the State of New York on the Hudson River are interstate commerce. A copy of the said opinion is annexed hereto, marked Exhibit D.

Commissioners Splawn and Patterson dissented from the opinion of the Commisison on the ground that the plaintiff, as an independent tower, is not engaged in the business of transportation or carriage under the established law that there is nothing in the Act to indicate that Congress intended to change the established law with respect to the status of independent towers, and that plaintiff is not subject to the Act. Commissioner Splawn also joined with Commissioners Johnson and Lee in dissenting from the opinion of the Commission, on the ground that towage services between points in the State of New York are not interstate commerce. The dissenting opinions are part of Exhibit D, annexed hereto.

[fol. 11] XVI

Based on its findings and conclusions, the Commission entered a Certificate and Order, dated February 2, 1943 which is annexed hereto, marked Exhibit E, and which plaintiff now seeks to enjoin, set aside, suspend and annul.

By its Certificate, the Commission certified that public necessity and convenience require the continuance of operation by Cornell Steamboat Company as a common carrier by water by towing vessels in the performance of towage of non-self-propelled freight-carrying vessels, in the waters hereinabove described.

By its Order, the Commission authorized "said carrier" to perform the services specified in the Certificate, subject to the Commission's authority and to the orders, rules, and regulations of the Commission.

The Commission directed that the Certificate and Order take effect and be in force from and after May 11, 1943.

XVII

The Commission's said Certificate and Order, dated February 2nd, 1943, was null and void, and should be enjoined, set aside, suspended and annulled because it was and is invalid and erroneous, as a matter of law, and was based upon findings and conclusions of the Commission in its report which were in error as a matter of law, and were without support in and contrary to the uncontradicted evidence before the Commission in the respects and for the reasons following:

(a) The Commission was in error in finding and concluding that plaintiff is engaged in the business of a carrier in the performance of towage services for hire under contract.

[fol. 12] (b) On the uncontradicted evidence in the record, the Commission was in error in failing to find and conclude that plaintiff, as an independent tower, is not a carrier, and is not engaged in the business of a carrier, under the established law of the land, and within the common meaning of the words as applied to the business of carriage and transportation, and within the legislative meaning of the words as used by Congress in statutes relating to the business of carriage and transportation.

(c) In the absence of any provisions in Part III of the Transportation Act of 1940 to indicate an intention of Congress to change the established law that independent towers, such as the plaintiff, are not carriers, the Commission was in error in ignoring the said established law and in assuming that Congress intended to bring such towers within the terms of the Act or to confer upon the Commission authority to classify such independent towers as carriers, —which they are not in fact.

(d) The foregoing errors of the Commission are further indicated by its certificate of a necessity for the "continuance" of operation by plaintiff as a common carrier by water. As plaintiff was not previously

engaged in the business of a common carrier under existing law, there was no basis for a certificate that plaintiff should "continue" to engage in that business.

(e) The Commission was in error in finding and concluding that it has authority under the provisions of Part III of the Transportation Act of 1940 to certify and regulate plaintiff as a person engaged in the business of a common carrier while at the same time finding and concluding that plaintiff would not have the rights and liabilities of a common carrier before the Courts under the law.

[fol. 13] (f) The Commission, as an administrative tribunal of the Federal Government without legislative powers, has wrongfully usurped the powers of the Legislature by attempting to alter the established law that independent towers are not carriers.

(g) Without prejudice to its contention that it is not engaged in the business of a carrier at all, the plaintiff further submits that if the facts and the law support any conclusion that plaintiff is engaged in the business of a carrier within the provisions of Part III of the Act, plaintiff's status in any event should be limited to that of a contract carrier.

(h) The Commission was in error in finding and concluding that the plaintiff has held itself out to perform towage services for the public on such terms and in such manner as to give to the plaintiff the status of a person engaged in the business of a common carrier.

(i) Under the established law, as well as under the specific provisions of Part III of the Transportation Act of 1940, the Commission was in error in finding and concluding that plaintiff's towage services between New York City and points in New York State on the Hudson River are interstate commerce.

(j) The Commission was in error under the law, and on the uncontradicted facts, in its refusal to grant plaintiff's petition to dismiss plaintiff's application for a permit as a contract carrier on the ground that plaintiff is not engaged in the business of a carrier and therefore is not subject to Part III of the Transportation Act of 1940.

[fol. 14] XVIII

Unless the relief prayed for herein be granted, plaintiff's rights will be seriously infringed, and plaintiff will sustain irreparable loss and injury.

Wherefore plaintiff prays:

First: That, pursuant to the Urgent Deficiencies Act, 38 Stat. 220, as reenacted as Section 47 of Title 28 U. S. C., a court of three judges, one of whom shall be a Circuit Judge, shall be convened to hear this case.

Second: That, after such hearing is had upon due and legal notice to the defendant, the Court will find and conclude that plaintiff, in its business of an independent tower, is not a carrier and is not engaged in the business of a carrier and is not subject to Part III of the Transportation Act of 1940, and that the Court will thereupon enter its order suspending, setting aside, and annulling the aforesaid certificate and order of the Interstate Commerce Commission dated February 2nd, 1943, and each and every part thereof, and perpetually enjoining the enforcement thereof: and will further direct and enjoin the Commission to reinstate the proceedings before it and to grant plaintiff's petition to dismiss its application, for lack of jurisdiction.

Third: In the alternative, if this Court, upon said final hearing herein, should find and conclude that plaintiff as an independent tower is a carrier within the terms and provisions of Part III of the Transportation Act of 1940, and is subject to the said Act, the Court will be pleased to find that plaintiff is not engaged in the business of a common carrier and can be subjected to the provisions of the said [fol. 15] Act only as a contract carrier, and will be further pleased to find and conclude that under the existing law and the express provisions of Part III of the said Act the plaintiff does not engage in interstate commerce with respect to any and all towage services performed between New York City and other places in New York State upon the Hudson River; and that the Court will thereupon enter its order decreeing that the aforesaid certificate and order of the Commission dated February 2nd, 1943 is null and void, and directing and enjoining the Commission to reinstate the proceedings before it and thereupon to issue a

proper report, certificate, and order in accordance with the findings and conclusions and order of this Court.

Fourth: That plaintiff may have such other and further relief as may be proper in the premises.

Respectfully submitted, Kirlin, Campbell, Hickox, Keating & McGrann, by Robert S. Erskine, a Member of the Firm, Attorneys for Plaintiff, Office and Post Office Address, 120 Broadway, New York City.

[fol. 16] EXHIBIT "A" TO PETITION

BEFORE THE INTERSTATE COMMERCE COMMISSION

In the Matter of The Petition of CORNELL STEAMBOAT COMPANY to Dismiss Its Application for a Permit under Section 309(f) of Part III of the Interstate Commerce Act

PETITION TO DISMISS APPLICATION FOR PERMIT

Comes now your petitioner, Cornell Steamboat Company, a corporation with a principal office at No. 22 Ferry Street, Kingston, N. Y., and upon the an-exed affidavit of Frederick Coykendall, verified the *16th* day of May, 1941, respectfully prays that the application heretofore filed by it for a permit under Section 309(f) of Part III of the Interstate Commerce Act be dismissed for the following reasons:

1. Your petitioner is not a common carrier, nor a contract carrier nor a private carrier, and is not a carrier of passengers or property in any manner, but its business consists solely of furnishing towage services for hire under private contracts and agreements and by reason of the said facts your petitioner is not subject to and does not come under the regulations of the aforesaid Act.

2. Your petitioner, in the performance of its business of furnishing towage services as stated above, does not engage in nor perform nor furnish any transportation of passengers or property within the lan-
[fol. 17] guage and intent of the provisions of Part III of the Interstate Commerce Act, and by reason of that

fact is not subject to and does not come under the regulations of the said Act.

Without prejudice to its prayer for relief on the grounds hereinabove stated, your petitioner further prays that it be held exempt from and not subject to the regulations of the aforesaid Act in so far as the towage services furnished by it as above stated are furnished wholly intrastate, to and from and between points within the State of New York, irrespective of whether or not the vessels to which the towage services are so rendered or any cargoes or property on board the said vessels are or may be engaged in interstate movements.

And your petitioner further prays that it may have such other and further relief as may be just in the premises.

May 16th, 1941.

Cornell Steamboat Company, by Frederick Coykendall, President, 22 Ferry Street, Kingston, N. Y.;
——— ———, Attorney for Petitioner.

[fol. 18] BEFORE THE INTERSTATE COMMERCE COMMISSION

In the Matter of the Petition of CORNELL STEAMBOAT COMPANY to Dismiss Its Application for a Permit under Section 309(f) of Part III of the Interstate Commerce Act

AFFIDAVIT

STATE OF NEW YORK,
County of New York, ss:

Frederick Coykendall, being duly sworn, says:

1. I am President of Cornell Steamboat Company, the petitioner herein, which is a corporation incorporated under the laws of the State of New York, with a principal office and place of business at 22 Ferry Street, Kingston, N. Y., and with a further office for the transaction of business at the foot of West 53rd Street, Borough of Manhattan, New York City.

2. Your petitioner, on January 1st, 1940, was and still is engaged in the business hereinafter described and the said company and its predecessor companies have been en-

gaged in the said business for upwards of more than ninety years.

3. Your petitioner has filed with the Interstate Commerce Commission an application for a permit under Section 309(f) of Part III of the Interstate Commerce Act; but has filed the application without prejudice to its con- [fol. 19] tention that it is not subject to and does not come under the regulations of the said Act.

4. Your petitioner has been and still is engaged solely in the business of furnishing towage services for hire, but it does not and never has held out that it is ready and willing to furnish said services to all comers, and has at all times reserved and still does reserve its right to undertake and perform only such towage services as it may see fit; and each and every towage service which it undertakes is performed under special agreement, either oral or written, with the owners or operators of the vessels towed.

5. Your petitioner's towage services as aforesaid are rendered and furnished in the waters of the Hudson River between Waterford, N. Y., and New York City, N. Y., and in the waters of the Harbor of New York and the waters surrounding New York City, between and to and from various points within those waters. The towage services in the Hudson River are usually suspended from about December to March of each year on account of ice.

6. For the performance of the said towage services your petitioner owns a fleet of upwards of 33 tugboats of varying size, power, and type, which are particularly fitted for the performance of the said towage services within the waters referred to above. The number of said tugs in active operation varies at different times of the year.

7. Each and every towage service is performed by your applicant under a special and private agreement entered into with the owner or operator of each vessel towed, and your petitioner has not any interest in any cargo or property which may be carried at any time on or in any vessel towed, nor any interest in the freight moneys payable to the owner or operator of the towed vessel by the owner, shipper, or consignee of any cargo or property on board the same.

[fol. 20] 8. Your petitioner's agreed charge for the towage service rendered under its special and private contract as referred to above is payable by the owner or operator of the vessel towed, and is a lien upon the said vessel, but is not a lien upon any cargo or property carried by the vessel towed, and is wholly independent of and has no connection with any contract or agreement between the owner or operator of the vessel towed and the owner, shipper, or consignee of any cargo on the same with respect to freights or other carrying charges to be paid by the cargo to the owner or operator of the towed vessel.

9. In the performance of its towage services as hereinbefore described, your petitioner does not at any time or in connection with any towage service, directly or indirectly, participate in the making of any through rates which may be agreed on between the owner or operator of the vessel towed and the owner, shipper, or consignee of cargo on board the same; and your petitioner does not at any time, in connection with its performance of any of its towage services, directly or indirectly undertake or agree to perform the said services in consideration of or in connection with, or with relation to, any through rate which may be agreed on between the owner or operator of the vessel towed and the owner, shipper, or consignee of the cargo on board the same.

10. In its aforesaid special and private contracts for the performance of towage services, your petitioner does not contract or undertake to carry or transport, by its tugs, any vessel or any cargo or property on board the vessel so towed, but contracts solely to furnish towage services to the vessel towed; and your deponent is informed and believes that under the established law your petitioner, in the performance of its agreed towage services, is not under any liability as a carrier to the vessel towed, or any property or cargo thereon, but is responsible only for negligence in the performance of the said towage services; and your deponent is further informed and believes that your [fol. 21] petitioner, with respect to any negligence in the performance of its aforesaid towage services, has not the defenses, statutory or otherwise, which might be available to a carrier of passengers or property, and that your petitioner's responsibility for the proper performance of tow-

age services to any vessel towed exists only during the actual performance of said towage services and is at an end as soon as the said agreed towage services have been completed.

11. Upwards of approximately 90% of the towage services performed and rendered by your petitioner under its special and private agreements, as aforesaid, during each year, are rendered and performed wholly within the State of New York to and from and between points within the said state in the waters referred to above. In connection with most, if not all, of those towage services, your petitioner has no knowledge nor any means of knowing the intention of the owner, shipper, or consignee of any cargo or property upon the vessels towed, nor the ultimate destination of such cargo or property. If any of the vessels towed by your petitioner wholly within the State of New York, as aforesaid, move at other times to or from points outside of the State of New York with their cargo or property on board, the said movements to or from points outside of the State of New York are not any part of the towage services rendered by your petitioner, and your petitioner has no connection therewith in any form or manner. Your petitioner's agreed charges under its special or private contracts for its towages of the aforesaid vessels within the State of New York are wholly independent of and have no connection with any towage charges of other parties with respect to other movements of the vessels to or from points outside of the State of New York; and your petitioner is informed and believes that under established law its responsibility with respect to any such vessels towed by it as aforesaid within the State of New York ends upon the completion of its said towage services within the State of New York, and that it is under no further or other responsibility with respect to the said vessels or with respect to any cargo [fol. 22] or property thereon in connection with any other movements of the said vessels to or from points outside of the State of New York.

12. In some instances, your petitioner's special and private agreements for the performance of towage services are made with owners of vessels who, according to your deponent's information and belief, own and operate the said vessels for the carriage of the said owners' products

and property, but in each said instance your petitioner's agreements for the performance of towage services to the said vessels are made with those parties solely in their character as owners or operators of the said vessels.

13. Your deponent believes that under the facts summarized above your petitioner herein is not subject to and does not come under any regulations of Part III of the Interstate Commerce Act, and therefore prays that the application for a permit, heretofore filed by your petitioner, may be dismissed.

14. Your deponent further prays that the Interstate Commerce Commission will grant to your petitioner a hearing with respect to, or an opportunity to submit proofs of, any other facts which the Interstate Commerce Commission may deem to be material in connection with the matters referred to herein.

Frederick Coykendall.

Sworn to before me this 16th day of May 1941. William Parks, Notary Public, Rockland County. Certificate filed in New York County, Clerk's No. 325, Register's No. 3P201. (Seal.)

[fol. 23] EXHIBIT "B" TO PETITION

INTERSTATE COMMERCE COMMISSION

No. W-359

CORNELL STEAMBOAT COMPANY CONTRACT CARRIER APPLICATION

Submitted..... Decided.....

Applicant found entitled to continue operations as a contract carrier by water, in the use of its towboats in towing barges, scows and similar vessels, loaded or light, between points in New York and New Jersey located on the waters of New York harbor, on a year around basis, and between those points and points on the Hudson River up to and including Waterford, N. Y., on a seasonal basis, by reason of having been engaged in such operations

prior to and on January 1, 1940, and continuously since. Permit issued and petition to dismiss application denied.

Robert S. Erskine for applicant.
Stanley Carpenter for rail carrier protestants.
Reginald G. Narelle for water carrier interveners.

REPORT PROPOSED BY ANDREW C. WILKINS, EXAMINER

By application filed May 21, 1941, Cornell Steamboat Company, a New York corporation, with its principal office at Kingston, N. Y., seeks a permit under the provisions of section 309(f)(g) of the Interstate Commerce Act authorizing continuance of operation as a contract carrier by water in interstate or foreign commerce, in furnishing under individual contracts or agreements the services of its [fol. 24] fleet of tugboats in towing barges, scows, and similar vessels carrying their cargoes either below or on deck, from and to all points on the Hudson River between Waterford, N. Y., and New York, N. Y., harbor points located in New York or New Jersey on the waters of the lower Hudson and the adjacent waters of New York harbor. The application was filed without prejudice to applicant's contention that in its performance of towage services for hire it is not a carrier and does not carry or transport any passengers or property, and that it is not subject to the Act.

On May 21, 1941, applicant filed a petition to dismiss its application on the grounds that, in the performance of its business of furnishing towage services as above-described, it does not engage in nor perform nor furnish any transportation of passengers or property within the language and intent of the provisions of part III of the Act, and, therefore, is not subject to and does not come under the regulations of the Act. Without prejudice to its request for dismissal on those grounds, applicant further prays that it be held exempt from and not subject to regulations of the Act insofar as its towage services are furnished wholly intrastate to and from and between points within the State of New York, irrespective of whether or not the vessels to which the towage services are so rendered or any cargoes or property on board those vessels are or may be engaged in interstate movements.

At the hearing rail carriers in Official Classification Territory appeared by counsel as protestants but offered

no evidence. The Northeastern Inland Waterways Association appeared as an intervener by its president, and indicated an interest in developing all of the facts for the record, but offered no evidence. These interveners will have a further opportunity to clarify their positions for the benefit of the Commission in any exceptions to the proposed report herein, which they may file.

Applicant was incorporated in 1878 to continue the towing business started in 1837 by the grandfather of its president, who has held that position for the past 29 years. From its [fol. 25] inception the business of the applicant has been and still is completely owned by succeeding generations of the same family. At the time of the hearing applicant owned and operated a fleet of upwards of 33 towboats, varying in power and size, some of which are powered by steam and others by diesel engines. One scow is maintained in connection with its repair equipment but applicant does not own or operate any barges or lighters or similar type of carrying craft. No cargoes of merchandise for hire or passengers are carried on any of the towboats and they are used exclusively in towing for applicant's customers, over 70 per cent of whom are shippers who own or operate the scows or barges used in carrying their own merchandise. Other customers are water carriers.

Towing services are rendered for customers in New York harbor and anywhere on the Hudson River up to Waterford, which is between the Troy lock and the entrance to the Erie Canal. Operations between points bordering on New York harbor are conducted on a year around basis but those on the Hudson are suspended during the season when ice prevents them, which is generally from the early part of December to about the middle of March. Applicant does not render any towing services on the ocean outside of the limits of New York harbor, as determined by the Commission in its order entered March 26, 1941, in Ex Parte No. 140.

The largest part of applicant's business is done on time contracts entered into for a period of years, while some contracts run for a single year and the balance consists of a small amount of miscellaneous contracts arranged from day to day. Arrangements for all of its towing services, whether for more than a year or for an individual job, are based on separate agreements or contracts. Most of the vessels towed are scows which carry their cargoes on

deck and deep boats or barges which carry the cargoes below deck in the hold. The basis for charges for the towing services has no relation to, or any connection with the amount of the freight charges paid by the owners of the cargoes for their transportation when they do not also own [fol. 26] the scows or barges. The only interest applicant has in a cargo is its weight and the size of the scow or barge on which it is loaded. The rate charged for towing is lower for the larger units. For example, the rate per ton for towing a 2000-ton barge would be less than the rate per ton for a 200-ton barge. The rate is also lower if the scow or barge is towed with others in a flotilla which applicant schedules for its customers to leave New York harbor on certain days of the week and to leave Albany, N. Y., or some other point on the upper Hudson certain other days of the week. This regular service is maintained under contract to meet the needs of certain customers. Other customers who can wait for their service until the regular flotilla is towed are given the benefit of the lower unit cost. If a customer desires individual service on a certain day the rate is necessarily higher.

No holding out of any offer of towing services is advertised by applicant in any daily papers or trade journals. Its witness thought that a simple announcement of towing services had been carried in the Bullinger's Guide for many years. An examination of the 1939, 1940 and 1941 editions of that guide fails to disclose such an announcement. Its business has been built up with certain individual customers over the many years of its operation. It has at times refused requests for towing services for various reasons, among which are the condition of the property to be towed, the requirement of a release from all liability, and when the requested service could not be rendered without injury to service desired by one of the regular customers.

Applicant does not issue any bill of lading or similar document with respect to the cargoes on the scows or barges towed. Each scow or barge has its own captain who looks after the safety of the vessel and its cargo. Neither the captain of the towboat nor any other employee of applicant has anything to do with the cargoes on the vessels in the tow. Applicant generally has no interest in or knowledge of the origin or final destination of the cargoes, and when the towing service is complete with the landing of the vessel at the place agreed upon, no further services are rendered. No

[fol. 27] arrangements for any through movement, of which the towing services might be a part, are ever entered into by applicant with any carrier. Therefore, the towing services rendered by applicant between points in the State of New York are, insofar as intrastate cargoes are concerned, intrastate in character and are not subject to regulation by this Commission. See section 302 and section 303(j)(k) of the Act. Approximately 95 per cent of the towing services of applicant are rendered between points in the State of New York. However, these services are sometimes rendered in connection with interstate cargoes, and applicant requests that such services, irrespective of whether the vessels or their cargoes are or may be engaged in interstate movements, be held exempt from regulation. The Commission has no authority to hold such services exempt from regulation. It does have the discretion under the provisions of section 306(e) to grant relief to contract carriers with respect to the filing of minimum rates and charges and observance thereof. But the evidence in the present record does not warrant the exercise of that discretion herein. Moreover, applicant has on file with the Commission its tariff I. C. C. No. 2, containing schedules of its minimum rates and charges for the performance, as a contract tower, of only such towage services as it may see fit to undertake on the Hudson River between Waterford, N. Y., and New York, N. Y., and on the waters of New York Harbor and the waters adjacent thereto, and intermediate points.

A check of applicant's records for the year 1940, which is considered fairly representative of its annual business for the past ten years, shows that only 4.4 per cent of its towing services were rendered between points in New Jersey adjacent to the lower Hudson River or New York Harbor and points outside the harbor in New York State. Regardless of the small proportion of the services rendered in connection with interstate movements it will be necessary for applicant to have a permit if it continues to render such services.

Towing services rendered by applicant in connection with interstate cargoes between points within the limits of the [fol. 28] Harbor of New York, N. Y., when such services are not a part of a continuous through movement under common control, management, or arrangement to or from a place outside the limits, have been exempted from regulation by the order of March 26, 1941, entered by the Commission in

Ex Parte No. 140, pursuant to the provisions of section 303(g) of the Act.

Upon brief applicant reaffirms the position taken in its petition to dismiss its application herein. It contends as follows:

1. That there are none of the distinctive features of carriage in applicant's business, in that he does not carry anything, does not have possession of either cargoes or passengers, has no direct or indirect connection with any contract of carriage, has none of the responsibilities of a carrier, and that he is not a carrier and is not engaged in the business of a carrier.

2. That by the plain language of the Act, the only persons or parties who are required to apply for certificates or permits and to whom the Commission has authority to issue them, are carriers; and as applicant is not a carrier it necessarily follows that the Commission has no authority to issue to or require applicant to hold a permit as a contract carrier.

3. That the Commission may regulate tugs and towage services which are owned and used as a part of the business of carriers subject to its regulation, but that nothing in the statutory definitions of "transportation facility" and "transportation" in section 302(g) and (h) gives to the Commission the authority to regulate tugs or towage services of an independent tower, who is not engaged in the business of "carrying" and who is not a "carrier."

4. That the administrative ruling of the Bureau of Water Carriers to the effect that a towing company such as applicant must be regarded as being a "car-
[fol. 29] rier" subject to the Act if it performs towage for a shipper or anyone not a carrier subject to the Act, is apparently based on a backhanded, or negative interpretation of the language of section 303(f)(2), and has no logical foundation and is contrary to the plain intent of Congress that section 303(f)(2) should eliminate and exempt incidental services *even when* performed for a carrier subject to part III.

5. That in instances in which the use of tugs or towage services are furnished *in fact* by the carrier itself,

they are an integral part of the carrier's business, and subject to regulation just as other phases of his business; but such instances lend no support to a conclusion that a tower like applicant, who merely performs towage services as herein described, is engaged in the business of a contract carrier by water.

6. That under the common meaning of the words it has long been an accepted fact that a "tower" is not a "carrier", and it must be assumed that when Congress, throughout all of the provisions of part III of the Act, limited those provisions to carriers by water, either common or contract, it intended to give the words their ordinary meaning, and did not intend to authorize the Commission to regulate anyone other than such a carrier.

The above is a brief outline of the main points argued in considerable detail by complainant in its brief, which includes excerpts from certain court decisions cited in support of the above contentions, all of which have been given careful consideration in arriving at the conclusions and findings hereinafter recommended.

Upon the record herein the Commission should reach the following conclusions: that the definitions of "transportation facility" and "transportation" as set forth in section 302(g) and (h) when applied to the towing services [fol. 30] of applicant in the use of its towboats, which are instrumentalities or equipment, in connection with transportation by water, subject to part III, brings applicant within the definition of a "contract carrier by water" set forth in section 302(e), and subject to regulation under the Act; that the provisions of section 303(f)(2) do not have the effect of exempting transportation by water furnished by any person to a shipper or a carrier not subject to parts I, II or III of the Act, nor do those provisions entirely exempt such transportation from regulation when furnished to carriers subject to parts I, II or III, but rather they make such transportation subject to regulation in the same manner as the transportation by such carriers to which such services (performance of floatage, car ferry, lighterage, or towage) are incidental; that it does not appear that the towing services, rendered by applicant to water carriers from and to points outside the limits of New York Harbor

are incidental to any transportation services rendered by such carriers but rather the entire or principal transportation services are rendered by applicant in towing the scows or barges for those carriers, since there is no evidence that those carriers have undertaken to perform under published rates, have performed, or expect to perform any transportation of the scows or barges in addition to the transportation services performed by applicant whereby the towage services of the applicant could be considered "incidental" to any transportation performed by such carriers; and that it must be concluded that the towage services performed by applicant for carriers from or to points outside the limits of New York Harbor, which are not shown to be incidental to any transportation performed by such carriers, and not otherwise exempt under the Act, are not exempt under the provisions of section 303(f)(2); that applicant having been in bona fide operation as a contract carrier by water in the performance of both regular and seasonal towage services prior to, on and since January 1, 1940, over the route or routes and between the ports above described, and having filed its application for a permit within the time limit and in conformance with the other [fol. 31] provisions of section 309(f)(g), is entitled to such a permit; and that the petition to dismiss its application for a permit should be denied.

The Commission should find that applicant was in bona fide operation on January 1, 1940, as a contract carrier by water, in interstate or foreign commerce, in the use of its towboats in towing barges, scows and similar vessels loaded with cargoes or light, between points in New York and New Jersey located on the waters described as included in New York Harbor in the order entered March 26, 1941, in Ex Parte No. 140, on a year around basis, and prior to January 1, 1940, between those points and points on the Hudson River up to and including Waterford, N. Y., on a seasonal basis, ice on the river permitting, from about the middle of March to the early part of December; that such year around and seasonal operations have been continued since that date; and that applicant is entitled to a permit as a contract carrier by water, authorizing the continuance of such year around and seasonal operations, subject, however, to general conditions which are necessary to carry out, with respect to the continuation of applicant's operations, the re-

quirements of part III of the Act, and the orders, rules, and regulations of the Commission thereunder.

An appropriate permit should be issued and an appropriate order denying the petition to dismiss the application should be entered.

[fol. 32] EXHIBIT "C" TO PETITION

INTERSTATE COMMERCE COMMISSION

No. W-359

CORNELL STEAMBOAT COMPANY—CONTRACT CARRIER APPLICATION

Submitted March 12, 1942. Decided June 15, 1942

1. Applicant found entitled to continue operation as a common carrier by water of non-self propelled freight-carrying vessels by means of towing vessels within the limits of New York Harbor, N. Y. and N. J., and on the Hudson River between New York Harbor and Waterford, N. Y., and all intermediate points, by reason of having been engaged in such operation on January 1, 1940, and continuously since. Certificate of public convenience and necessity issued.

2. Applicant's petition to dismiss its application denied.

Robert S. Erskine, for applicant.

Stanley Carpenter, Reginald G. Narello, James A. Martin, Maurice A. Krisel, Richard H. Specker, Harry C. Ames, Alfred S. Knowlton and *Seymour P. Egerton* for intervenors.

Report of the Commission

Division 4, Commissioners Porter, Mahaffie and Miller

By DIVISION 4:

Exceptions to the report proposed by the examiner were filed by applicant and certain of the intervenors, and the issues were orally argued. Our conclusions differ from those recommended by the examiner.

[fol. 33] By application filed May 21, 1941, Cornell Steamboat Company, a New York corporation, with its principal office at Kingston, N. Y., seeks a permit under the provisions of section 309 (f) of the Interstate Commerce Act authorizing continuance of operation as a contract carrier by water in interstate or foreign commerce, in furnishing under individual contracts or agreements the services of its fleet of tugboats in towing barges, scows, and similar vessels carrying cargoes either below or on deck, from and to all points on the Hudson River between Waterford, N. Y., and New York, N. Y., harbor points located in New York or New Jersey on the waters of the lower Hudson, and the adjacent waters of New York Harbor. The petition further prays that if the facts show that applicant, although applying for a permit, is entitled to a certificate, the application be considered one for the appropriate form of authority. The application was filed without prejudice to applicant's contention that in its performance of towage services for hire it is not a carrier and does not carry or transport any passengers or property, and that it is not subject to the act.

On May 21, 1941, applicant filed a petition to dismiss its application on the grounds that, in the performance of its business of furnishing towage services as above described, it does not engage in or perform or furnish any transportation of passengers or property within the language and intent of the provisions of part III of the act, and, therefore, is not subject to and does not come under the regulations of the act. Without prejudice to its request for dismissal on those grounds, applicant further prays that it be held exempt from and not subject to regulation insofar as its towage services are furnished wholly intrastate to and from and between points within the State of New York, irrespective of whether or not the vessels to which the towage services are so rendered are engaged in, or any cargoes or property on board those vessels are moving in, interstate commerce.

Rail carriers in official territory and the Northeastern Inland Waterways Association, Incorporated, intervened at the hearing, but introduced no evidence. The Atlantic [fol. 34] Coastwise and Inland Water Carriers Association, Incorporated, and Mississippi Valley Barge Line Company were permitted to intervene for the purpose of filing exceptions, and the Boston Towboat Company for the purpose of

participating in oral argument. Most of the interveners contend that applicant should be regulated as a common carrier, although differing as to whether services rendered other water carriers should be exempt from regulation.

Applicant was incorporated in 1878 to continue the towing business started in 1837 by the grandfather of its president, who has held that position for the past 29 years. From its inception the business of the applicant has been and still is completely owned by succeeding generations of the same family. At the time of the hearing applicant owned and operated a fleet of upwards of 33 tugboats of undisclosed power and size, some of which are powered by steam and others by diesel engines. One scow is maintained in connection with its regular equipment, but applicant does not own or operate any barges or other type of carrying craft. No cargoes of merchandise or passengers are carried on any of the tugboats. The tugboats are used exclusively in towing for applicant's customers, over 70 percent of whom are shippers who own or operate the scows or barges used in carrying their own merchandise. Other customers are water carriers.

Applicant renders towing services the year around within the limits of New York Harbor, and harbors contiguous thereto, as those limits were defined by us in our order of March 26, 1941, entered in Ex Parte No. 140. It also renders towing services on the Hudson River up as far as Waterford, N. Y., above Troy, N. Y., and the entrance to the Erie Canal, but those operations are suspended during the season when ice prevents them, which is generally from the early part of December to about the middle of March.

Applicant has on file with the Commission its schedule I. C. C. No. 2, containing its minimum rates and charges for the performance, as a contract tower, or only such towage services as it may see fit to undertake under private contract on the Hudson River between Troy, N. Y., and New York Harbor, and intermediate points.

[fol. 35] Applicant's records for the year 1940, which it considers fairly representative of its annual business for the past 10 years, shows that only 4.4 percent of its towing services were rendered between points in New Jersey adjacent to the lower Hudson River and points outside the harbor in New York State. However, much of the transportation between up-river points and harbor points in New York must be interstate commerce, as the New York-New Jersey

boundary follows the middle of the river, 4 Stat. L. 708, and would be crossed in the ordinary course of navigating large flotillas of barges up or down the river.

By far the largest part of applicant's business is done on time contracts entered into for a period of years, while some contracts run for a single year, and the balance consists of miscellaneous contracts arranged from day to day. From 12 to 13 percent of its business is of the latter type. Arrangements for all of its towing services, whether for a period of time or for an individual operation, are based on separate agreements or contracts. The vessels towed are scows which carry their cargoes on deck and barges which carry the cargoes below deck in the hold. Under the form of contract used, the shipper does not agree to make shipments; but if it does make shipments, it agrees to employ the towage services of applicant, and to pay therefor at the rates stated in the contract, which are based upon the capacities of the barges described therein. If reductions are made by applicant in the rates charged other shippers for like service, the contract rates are to be reduced to the same level; and if applicant's fuel or labor costs are increased due to strikes or other causes beyond applicant's control, the contract charges are to be increased provided the increases are also made effective as to other customers for similar services. Barges are not deemed to be in applicant's custody or under its responsibility while lying at docks or not being actually towed. The term of the contract is stated, and provision is made for its continuance from year to year if not canceled at the end of the year. Such a contract, prior to the requirement of law for the publication of tariffs, served the same purpose as a common [fol. 36] carrier published tariff, which fixes rates and conditions for future acceptance. In addition it reserved to applicant the sole right to tow such traffic covered by the contract as the shipper might decide to move by barge.

The charges for towing services have no relation to, and no connection with the freight charges paid by the owners of the cargoes for their transportation. Applicant's only interest in a cargo is with respect to the size of the scow or barge on which it is loaded, and the weight of the cargo which controls the load-water draft of the barge. Rates charged for towing are lower for the larger units. For example, the rate per ton for towing a barge with a minimum of 1,500 tons is less than the rate per ton for a

300-ton-minimum barge. The rate is also lower if the scow or barge is towed with others in a flotilla. Applicant maintains a schedule for its customers under which a tow leaves New York Harbor daily for points as far north as Poughkeepsie, N. Y., and every other day for Albany, N. Y., and other points on the upper Hudson. This regular service is maintained under contract to meet the needs of certain customers. Other customers who can wait for their service until the regular flotilla is towed are given the benefit of the lower unit cost. In flotilla towing the rates are the same to all customers for equal tonnages. If a customer desires individual service the rate is necessarily higher. From 85 to 90 percent of applicant's business is in those flotillas. The flotilla may consist of from 5 to 50 barges. Applicant has practically no limit on such flotillas, but takes all that is offered and adds such additional tugs as may be required.

No holding out of any offer of towing services is advertised by applicant in any daily papers or trade journals. Its witness thought that a simple announcement of towing services had been carried in Bullinger's Guide for many years. An examination of the 1939, 1940 and 1941 editions of that guide fails to disclose such an announcement. Its business has been built up with individual customers over the many years of its operation, and, as the witness said, "The business has been going on for so long that every-[fol. 37] body knows it." Applicant has at times refused requests for towing services for various reasons, among which are the condition of the property to be towed, unsatisfactory credit, and when the requested service could not be rendered without injuring one of the regular customers. How such injury could result is not explained, and, in view of the evidence that there is practically no limit to the number of barges it can include in a flotilla, the statement is unintelligible. It also frequently declines to perform towage unless it is given a release from all liability, including liability for negligence.

Applicant does not issue bills of lading or similar documents with respect to the cargoes on the scows or barges towed. Each scow or barge has its own captain who looks after the safety of the vessel and its cargo. Neither the captain of the tugboat nor any other employee of applicant has anything to do with cargoes on the vessels in the tow. Applicant generally has no interest in and no

"official knowledge" of the origin or final destination of the cargoes, and when the towing service is complete with the docking of the vessel at the place agreed upon, no further services are rendered. No arrangements for any through movement, of which the towing services might be a part, are ever entered into by applicant with any other carrier. Applicant claims a lien on the barges towed for its towing charges, but no lien on the cargoes. When the barge is a chartered one, applicant relies on the credit of the charterer.

Are Towers To Be Regulated As Carriers?

The first and fundamental issue raised is whether persons engaged, as is the applicant, only in towing for others by non-carrying vessels are to be regulated as carriers under part III of the act.

In its brief applicant contends that its petition should be granted and its application should be dismissed, for the following reasons:

> The petitioner is not a carrier, and is not "engaged in the business of a contract carrier by water."
>
> [fol. 38] No authority is vested in the Commission by part III of the act, and more particularly section 309(f) to issue a permit to, or to require that a permit be held by, any person who is *not* "engaged in the business of a contract carrier by water."
>
> The legislative history of the act and the language of the act itself indicate plainly that Congress did not include towers, such as the petitioner, in the category of the water *carriers* which Congress intended to regulate.
>
> In the absence of any specified provision of the act to bring towers, such as the petitioner, within the category of water *carriers*, it can not be assumed that Congress intended to change the long established law of the land that such a tower is not a carrier, or that Congress intended to include such a tower when it authorized the Commission to regulate *carriers* by water.

In support of its contention that it is not a carrier, applicant relies upon the following court decisions and the statements therein which are first set forth. This is followed by our own comments.

In *Stevens* v. *The White City*, 285 U. S. 195, 200, the court said that under a towage contract the tug is not a bailee of the vessel in tow or its cargo; that it does not have such control of the tow as belongs to common carriers and other bailees; that the vessel in tow, its cargo and crew, remain under the authority of its master, and in emergency the duty is on him to determine what shall be done for the safety of his vessel and her cargo; and that a contract merely for towage does not require or contemplate such a delivery as is ordinarily deemed essential to bailment. This case was an action for damages against a tug for injury to her tow.

In *Wells* v. *The Steam Navigation Co.*, 2 N. Y. 204, 208, the court said that it was a misnomer to call defendants common carriers, or carriers of any kind in relation to the business of towing boats; nor were they bailees, for the [fol. 39] property towed is not delivered to them, nor placed within their exclusive custody or control, but remains in the possession, and for most purposes in the exclusive care of the owners or their servants. This, too, was an action for damages against a steamboat for injury to her tow. The court held that the tower might lawfully contract for a more restricted liability than would be implied against it in the absence of a special contract.

Distinguishing its decision in *Sacramento Nav. Co.* v. *Salz*, 273 U. S. 326, 331, from two earlier cases, the court said therein, "The most important of these differences is that in both cases it was held that contracts of towage and not of affreightment were involved." After referring thereto, applicant goes on to say that section 3 of the Harter Act (46 U. S. C., Sec. 192) gave certain defenses on certain conditions to the owner of "any vessel transporting merchandise or property"; and such defenses were not available to tug owners in performing contracts of towage because their tugs were not transporting or carrying anything. In that case the owner of a barge and a steamer used to tow the barge issued a bill of lading for a cargo loaded on the barge, and through negligence of the towing steamer the barge was sunk and the cargo lost. The sole issue was whether the barge alone or the combination of tug and barge was the "vessel transporting" the cargo, within the meaning of the Harter Act. The Court held that in such case the barge and tug together constitute the vessel transport-

ing merchandise or property within the meaning of that act. The Court there said:

> Considering the language of the bill of lading in the light of all the circumstances, it is manifest that we are dealing with a single contract and the use of the tug must be read into that contract as an indispensable factor in the performance of its obligations. To transport means to convey or carry from one place to another; and a transportation contract for the barge without the tug would have been as futile as a contract for the use of a freight car without a locomotive. In [fol. 40] this view, by the terms of the contract of affreightment, in part expressed and in part necessarily resulting from that which was expressed, the transportation of the goods was called for not by the barge, an inert thing, but by the barge and tug, constituting together the effective instrumentality to that end.
>
> It is said that the Harter Act is to be strictly construed. *The Main* v. *Williams,* 152 U. S. 122, 132. Even so, the rule of strict construction is not violated by permitting the words of a statute to have their full meaning, or the more extended of two meanings. The words are not to be bent one way or the other, but to be taken in the sense which will best manifest the legislative intent. * * *
>
> In *The Columbia, supra,* 73 Fed. 226, it was held that a barge having no motive power and a tug belonging to the same owner and furnishing the motive power constituted one vessel for the purposes of the voyage. In that case, wheat was to be transported by means of the barge, and the owner of the barge and tug undertook the transportation. The court said (p. 237): "As the wheat was to be carried on board the barge, which had no motive power, of necessity such power had to be supplied by the carrier. * * * When the tug made fast and took in tow the barge, to perform the contract of carriage, the two became one vessel for the purpose of that voyage,—as much so as if she had been taken bodily on board the tug, instead of being made fast thereto by means of lines." It was, accordingly, held that without surrendering both vessels, the owner was not entitled to the advantages of Revised Statutes Sec. 4283 *et seq.,* providing for a limitation of liability of "the owner of any vessel," etc.

The Harter Act was again construed in *The Murrell*, 200 Fed. 826, and applicant relies upon the statement of the [fol. 41] court, page 829, that, to say the owner of the tug was "engaged in transporting merchandise or property" where the tug and tow belong to distinct owners having with each other only the relations arising under an ordinary contract for safe towage, would be to extend the words of that act so as to make them include what Congress never intended them to include; that there is nothing in the agreement of the owner of a tug to tow another owner's vessel which can be regarded as making the latter vessel or her cargo the cargo of the tug. That, too, was an action for damage to the tow. While the barge there was under charter to the tow, the court said that to regard tug and barge as one vessel in that case and thus bring it under the Harter Act would be to permit petitioner to treat both vessels as one in a proceeding instituted by him on the theory that they are distinct and independent.

In *Bradley* v. *Lehigh Valley R. Co.*, 145 Fed. 569, 573, the court distinguished that case, where the relation of the tug was one of towage, from *The Nettie Quill*, 124 Fed. 667, where a locomotive carried on a barge towed by that steamer was dumped overboard, in which case a bill of lading had been issued by the steamer, resulting in a contract of affreightment rather than towage.

Applicant further contends that there are none of the distinctive features of carriage in its business; that it does not carry anything, does not contract nor have possession of cargoes or passengers, has no connection with any contract of carriage, has none of the responsibilities of a carrier, is not engaged in the business of a carrier, and that therefore it is not a carrier. It says that it has been a litigant in numerous matters in the Federal courts, but in none of those cases has it or its tugs been held to liability as a carrier.

It will be seen that all the foregoing decisions involved claims for damages to the tow or its cargo, and all held in effect that the owners of towboats, when engaged only in towing vessels belonging to others and not under contracts of affreightment, were not carriers. Relating, as they do, to loss and damage, we do not accept them as determinative [fol. 42] of the status of towers under part III of the act, which specifically provides in section 320(d) that:—

> Nothing in this part shall be construed to affect any law of navigation, the admiralty jurisdiction of the

courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this part.

In view of section 320(d), we consider that a finding that towers are carriers within the contemplation of part III would not affect their liability for loss or damage. Therefore the foregoing decisions may not be construed as a bar to the regulation of towers under part III.

Applicant asserts that part III does not authorize nor contemplate that a permit be issued to or held by anyone but a carrier, and that the history and plain language of part III do not justify the view that Congress intended to authorize the Commission to regulate anyone other than a carrier. In support thereof it relies upon the repeated use of the term "carrier" throughout part III, and cites the use of the same term in the Congressional Record when part III as a bill was under consideration in Congress. It contends that a carrier is one who carries, and that "carry" is defined as "to convey or transport while supporting." As it does not furnish the vessel which supports the freight transported in its tows, applicant concludes that it is not a carrier. But the Circuit Court of Appeals, Seventh Circuit, in *Belt Ry. Co. of Chicago* v. *United States,* 168 Fed. 542 (dismissed on certiorari, 223 U. S. 743), found the Belt Railway Company of Chicago to be a common carrier in the service of transferring the cars of trunk lines from the tracks of one trunk line to the tracks of another within the terminal area, by means of its locomotives, although it did not furnish the cars, and had no dealings with the shippers.

Towage, as such, is specifically mentioned in part III only twice. Section 303, dealing with exemptions, in par. (f) [fol. 43] provides that the provisions of this part shall not apply (1) to transportation by water by a carrier by railroad subject to part I or by a motor carrier subject to part II incidental to transportation subject to such parts, in the performances of floatage, car ferry, lighterage or towage, but such transportation shall be subject to part I or part II; and (2) to transportation by water by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad, or an express company, subject to part I, a motor carrier subject to part II, or a water carrier subject to part III, in the performance of floatage,

car ferry, lighterage, or towage; but that such transportation shall be considered to be performed by such carrier or express company as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water to which such services are incidental.

Clearly, applicant's operations are not those described in section 303(f)(1); and they are not those described in section 303(f)(2) except to the extent that it performs them for another carrier which is subject to parts I, II, or III; and to the extent that its operations were performed for such other carriers (whether as agent or under a contractual arrangement) it acquired no "grandfather" rights. This section of the act discloses no intention to exempt any towage whatever from regulation, but insures the regulation of certain described towage in connection with regulation of the carrier in whose interest it is performed. If any inference whatever as to towage not described therein is to be drawn from this section, that inference is the purpose of the Congress to regulate, not to exempt from regulation.

Part III, section 302, Definitions, provides, par. (c), that, as used therein, the term "water carrier" means a common or a contract carrier by water. "Common carrier by water" as defined in par. (d) means any person which holds itself out to the general public to engage in transportation by water in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, with one exception not pertinent here. "Contract carrier by water" per par. (e), means any person which, [fol. 44] under individual contracts or agreements, engages in the transportation (other than that referred to in par. (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation. An all-inclusive definition of "transportation" is not given in this part, but it is provided (section 302(h)) that the term "transportation" includes the use of any transportation facility (irrespective of ownership or of any contract, express or implied, for such use), and includes any and all services in or in connection with transportation, including the receipt, delivery, (omission) storage, and handling of property transported or the interchange thereof with any other agency of transportation. And "transportation facility" is defined (section 302(g)) to include any

vessel, warehouse, wharf, pier, dock, yard, grounds, or any other instrument or equipment of any kind, used in or in connection with transportation by water subject to this part.

Transportation is defined in Funk and Wagnalls Standard Dictionary as "the act of transporting, or the state of being transported; conveyance; carriage of persons or commodities from one place to another"; and "transport" as "to carry or convey from one place to another. Specifically: * * * (2) *Nautical.* To haul (a vessel) about a harbor by hawsers."

A tug which engages in towing barges for a carrier subject to the act in the conduct by the latter of interstate transportation, becomes a "vessel used in or in connection with transportation by water subject to" part III. Some of applicant's business is of that nature; but what proportion, and how much thereof would be subject to regulation only as the business of the bill-of-lading carrier, is not disclosed on this record, as applicant did not make a full disclosure of its operations because of its contention that it is not a carrier.

That the furnishing of a facility in connection with interstate commerce by railroad is sufficient to constitute one a carrier subject to part I was settled in *Union Stock Yard & Transit Co.* v. *United States,* 308 U. S. 213. In that case a [fol. 45] stockyard company which had divested itself of control of its railroad tracks, but which was engaged in loading and unloading livestock through use of its platforms and chutes, was held to be a "carrier" providing railroad "terminal facilities", and engaged in "transportation of property wholly by railroad" within part I. Clearly, to the extent that any tower furnishes facilities essential to transportation in interstate or foreign commerce which is subject to part III, it is a carrier within the meaning of that part.

Certainly a tower is engaged in transportation, in the ordinary sense of that term. It hauls vessels from place to place by hawsers. Vessels are property: therefore it conveys property from one place to another. In our opinion, "transportation", as used in part III, is to be taken in its ordinary sense, in addition to including the facilities and services specified in section 302(g) and (h). In this view of the term, a tower engages in transportation by water in interstate or foreign commerce of property or a class of

property for compensation, when for compensation it tows barges across a State line. It is therefore a carrier within the definitions of carriers in part III, and subject to the extent that its operations fall within the exemptions provided in that part.

But entirely apart from the views expressed in the next three preceding paragraphs, we think that authority to regulate towers engaged in the interstate towing of barges for compensation is within the broad purposes of part III. There is no contention but that it was intended to subject to regulation the barge in which commodities are moved in interstate commerce. Obviously an inert barge cannot move property in interstate commerce without the aid of a propelling medium. To hold that we can regulate the barge, but cannot regulate the towboat without which the barge cannot move, would be like holding that we can regulate railroad cars but not separately-owned locomotives by which the cars are moved, or can regulate automobile freight-carrying trailers but not separately-owned motors which draw them. It would nullify our authority to see that the charges against shippers are reasonable and non-[fol. 46] discriminatory in at least those numerous instances where the shipper provides his own barge. And it would leave unregulated one class or kind of transportation and a considerable volume of interstate commerce as to which there is, in our judgment, the same need for regulation as in the case of other classes or kinds of transportation and other interstate commerce, which are admittedly subjected to regulation.

Even the furnishing for compensation (under a charter, lease or other agreement) of a vessel, to a person other than a carrier subject to the act, to be used by the person to whom the vessel is furnished in the transportation of its own property, constitutes one a contract carrier by water; section 302(e). Since one who merely furnishes a tugboat to another for the use of the latter in the transportation of his own property is subjected to regulation, *a fortiori* would Congress intend to subject one to regulation who operates a tug for compensation in transporting barges laden with the property of the barge owner. Seventy per-cent of applicant's business is of the latter nature.

We conclude that part III discloses the intention of Congress to regulate towers engaged in interstate towing except to the extent that specific exemptions are provided.

Transportation By Water Between Two Points in the Same State But Passing Through Another State en Route

Having concluded that towers are embraced within the term carriers as used in part III, we now turn to a consideration of whether transportation by water between points in a single State but passing through another State is within our jurisdiction under part III. For, as has been shown, in performing towage between New York Harbor and upper Hudson River points much of applicant's traffic crosses the New York-New Jersey State line. This question was not argued by applicant, because of the position it took that it is not a carrier.

Under part I of the act, jurisdiction is specifically conferred over transportation "from one State * * * to [fol. 47] any other State." Sec. 1, par. (1) (c). It is further provided, Sec. 1, par. (2) (a), that the provisions of this part do not apply to transportation "wholly within one State and not shipped to or from a foreign country from or to any place in the United States."

Part II specifically confers jurisdiction over transportation "between any place in a State and any place in another State or between places in the same State through another State." Sec. 203 (a) (10).

Under part III jurisdiction is specifically conferred over transportation "from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States." Sec. 302(i)(1). It is also provided, sec. 303 (k), that "nothing in this part shall authorize the Commission to prescribe or regulate any rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose." A like provision is contained in part II, sec. 216(d).

It will be seen that jurisdiction over transportation between points in a State through another State is conferred in specific terms in part II, but not in parts I and III. The Commission and the courts have construed part I as conferring jurisdiction over such transportation, and this is so well established as to require no citations. Should a like construction be placed upon part III?

Examining one of the cases covering such transportation to see the reasoning followed, we turn to *United States* v. *Delaware, L. & W. R. Co.*, 152 Fed. 269. The shipment under consideration moved from New York, N. Y. to Buffalo, N. Y., through New Jersey and Pennsylvania. The court, although recognizing that the language "from one State to any other State" was susceptible of the literal interpretation that it would not include the transportation there involved, pointed out also that "at the same time it is a perfectly correct statement to say that goods shipped from New York to Buffalo on the Lackawanna road are transported from one State to another"; and expressed [fol. 48] the view that too much weight should not be given "to a critical examination of the precise language" defining transportation subject to part I as transportation "from one State to any other State." Such transportation, said the court, cannot be efficiently regulated at all unless it is regulated by the United States. The court referred to the provision excepting transportation "wholly within one State", and reasoned that the word "wholly" imports that the provisions of the act shall apply to any transportation of property which is not wholly within one State. But it does not follow that the court would have held otherwise than it did in the absence of such a provision, when it is considered that this was a proceeding under the Elkins Act, and if the carrier was not subject to part I with respect to this transportation, it could rebate with impunity, as obviously it was not an intrastate shipment which could be regulated by the State of New York, and in the absence of Federal regulation it was not subject to regulation at all; and there could be no reasonable ground for supposing that Congress intended to produce such a result. The exception in part I as to transportation "wholly within one State" amounts to nothing more or less than a denial of any jurisdiction over intrastate commerce as such. As above indicated, part III likewise contains a provision to the same effect only broader, namely, that this Commission shall not regulate rates for intrastate transportation for any purpose whatever; so that if the words "wholly within a State" in part I fortify the conclusion that the Commission has jurisdiction under that part over transportation between points in a single State through another State, the part III provision referred to fortifies a like conclusion as to similar transportation under part III. The reasons

for holding the transportation considered in the case cited, to be subject to part I, are as cogent reasons for finding transportation of the character here considered to be subject to part III.

Taking one illustration: If we were to find that we cannot regulate transportation by water between two points in the same State which passes through another State enroute, we would be in the position of saying that because the origin [fol. 49] and destination are in the same State we have no jurisdiction over through all-water shipments from Chattanooga, Tenn., on the Tennessee River, to Memphis, Tenn., on the Mississippi River, although the route extends from Tennessee through Alabama, back through Tennessee, and through Kentucky to the Ohio River, thence on the Ohio along the border between Illinois and Kentucky to Cairo, Ill., thence on the Mississippi bordering Kentucky, Missouri, Arkansas and Tennessee; but at the same time asserting jurisdiction over transportation between intermediate points on the same route where origin and destination are in different States; in other words, that we can regulate the rates for the several interstate *parts* of the transportation, but cannot regulate the rates for the *through* interstate transportation which is comprised of such parts. The through transportation would thus be left subject to no regulation whatever. *Missouri Pacific R. Co.* v. *Stroud*, 267 U. S. 404.

As between two interpretations, one of which would leave such water transportation as is here considered free of all regulation, and the other of which would subject such transportation to the jurisdiction of this Commission in harmony with the jurisdiction which it clearly has over similar rail and motor transportation under parts I and II, we entertain no doubt that the latter is the correct interpretation, and we so construe part III.

IS APPLICANT A CONTRACT CARRIER OR A COMMON CARRIER?

We come now to a consideration of the issue whether applicant is to be regulated as a contract carrier or as a common carrier. That question must be determined by the nature of the business applicant was conducting on and since the "grandfather" date. "The character of the service, in its relation to the public, determines whether the calling is a public one." *Union Stock Yard & Transit Co.* v. *United States*, 308 U. S. 213, 220.

The fact that applicant does not assume liability as a common carrier for the freight contained in the barges [fol. 50] towed is not conclusive that applicant is not a common carrier. In *Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 207, quoting *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, the court said, "A common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests." In that case a tower of logs was held to be a common carrier, regardless of the fact that all tows were "at owner's risk." It was engaged in the general towboat business; by a tariff it gave public notice of its willingness to transport logs, and the court found that its towboats were devoted to the public use.

Applicant's contention that all its towage has been performed either upon yearly contracts, or upon special contracts covering the individual job, is not determinative of the issue. The ordinary bill-of-lading issued by common carriers generally on every shipment transported is an individual contract covering the transportation of an individual shipment.

The test of a common carrier is whether it transports for the public generally. The evidence of record on that subject is, in part, as follows:

> Question: Within the range of your operation, with credit considerations being favorable, contents of the barges being what you think they should be, will you tow for any one seeking your services?
>
> Answer: We are like to, yes.
>
> . . . . . .
>
> Answer: We don't hold ourselves out at all. As a rule, we do take orders, as I mentioned. I think that 12 or 13 percent of our business is miscellaneous business. People will call up today and say that they want us to take a barge from here to there. We ask what kind of barge it is and how much it carries, and we give them a price, and we do that job. The rest is all by yearly or regular arrangements with customers, even down to the naming of the barge that they want towed.
>
> . . . . . .

[fol. 51] Answer: We have some on the blacklist, whom we do not tow, because we know that they don't pay.

* * * * * * *

Question: But if there is some boat owner who may not have a yearly contract with you—and provided that the vessel and the cargo and the credit arrangement are satisfactory—you will tow his boat in that fleet?

Answer: Surely—if he gives us an order for it before the tow starts.

Witness further testified that in the tows that leave New York nightly for up-river points "we have practically no limits; we take all that will come"; and explained that by "all that will come" he meant, "individual customers or people who have made arrangements with us. * * * We must have the order for the barge before the barges leave the stake boat." He further testified that arrangements for a particular towing job could be entered into over the telephone, and upon inquiry whether such an arrangement would be entered into with persons with whom he had had no prior dealings, replied: "We would want to know something about them. If it was out of the blue, we would want to know who he was, and what he had to go, before we would give him a price." Sometimes prepayment of charges has been required. As to the breadth of applicant's willingness to transport: Witness testified that "Having been there since 1837, we pretty much know every manufacturer on the river. We go to him and ask him for a contract, and show him what kind of service we can give, and he gives us the contract." And again, respecting the daily towing schedules: "The business has been going on for so long that everybody knows it."

We find that the evidence discloses the fact of a general holding out tempered by prudence, a desire for business rather than a desire to exclude any. We find as a fact that applicant holds itself out to the public to tow for anyone with ability and willingness to pay for the service. Such a holding out, accompanied by performance, in itself constitutes one a common carrier.

[fol. 52] FINDINGS OF FACT AND CONCLUSIONS THEREON

Upon the evidence we find the following facts:

1. That this application was filed May 21, 1941, under section 309 (f) of the Interstate Commerce Act, which was within a period of 120 days after that section became effective, but expressly without prejudice to applicant's contention that it is not a carrier, does not transport any persons or property, and is not subject to part III of the act.

2. That applicant, with its own non-carrying vessels was engaged in towing non-self-propelled freight-carrying vessels in interstate or foreign commerce on January 1, 1940, within the limits of New York Harbor, as these limits are defined by us in Ex Parte No. 140, and, during the 1939 season of navigation, on the Hudson River as far north as Waterford, N. Y., and serving intermediate ports.

3. That it has continued so to operate since that date, down to the date of the hearing herein.

4. That on the aforesaid waterways applicant held itself out to tow between all intermediate points; and that it did tow to and from a sufficiently representative number of points to constitute a fulfillment of its holding out as a carrier by towboat between all points on those waterways.

5. That its towage charges have been based upon the size and load-water draft of the vessels towed, and not upon the character of the freight loaded in said vessels except to the extent that the weight of the lading affects the draft of the vessel.

6. That its holding out was to tow non-self-propelled freight-carrying vessels which it considered in seaworthy condition, both loaded and empty, regardless of the character of freight loaded therein, for all who desired to engage its services and whom it considered financially responsible, and that it did so transport.

[fol. 53] Upon these facts we conclude that applicant was in bona fide operation in interstate commerce as a common carrier by water of non-self-propelled freight-carrying vessels by means of towing vessels between all points within the limits of New York Harbor, N. Y. and N. J., as those limits are defined in our order of March 26, 1941, entered in Ex Parte No. 140, and on the Hudson River between New

York Harbor and Waterford, N. Y., and all intermediate points; that such operation has been continued since that date; and that applicant is entitled under the "grandfather" clause of section 309(a) of the act to a certificate of public convenience and necessity authorizing continuance of such operation, subject, however, to general conditions which are necessary to carry out, with respect to continuation of applicant's operations, the requirements of part III of the act, and the orders, rules and regulations of the Commission thereunder.

The petition to dismiss the application will be denied. A certificate will be issued in accordance with these findings.

Referring to applicant's prayer, made without prejudice to its request for dismissal of its application, that it be held exempt from and not subject to regulation insofar as its towage services are performed wholly intrastate, irrespective of whether the vessels to which the towage services are rendered are engaged in, or any cargoes or property on board those vessels are moving in, interstate commerce: A railroad company engaged in moving the cars of others from one trunk line to another with its own locomotives is a common carrier engaged in interstate commerce and subject to the Safety Appliance Acts, even though its services are performed wholly within a State, and though it furnishes no cars, issues no bills of lading, and has no dealings with the shipper or with anyone on his behalf. *Belt Ry. Co. of Chicago* v. *United States, supra.* Likewise, when applicant tows the barges of other carriers, which barges are moving in interstate commerce, applicant engages in interstate commerce. Whether its participation in such interstate commerce is under the conditions embraced in section 303(f), thus exempting the tower from regulation and subjecting the towage to regulation as a part of, and [fol. 54] in the same manner as, the transportation of the carrier from whom applicant receives or to whom it delivers the barges, we cannot determine upon this record because applicant did not make a full disclosure of the facts with respect to such towage. No order of exemption by us is required by towers whose towage is embraced in section 303 (f). Commissioner Miller concurs in the results.

CERTIFICATE AND ORDER

At a Session of the Interstate Commerce Commision, Division 4, held at its office in Washington, D. C., on the 15th day of June, A. D. 1942.

No. W-359

CORNELL STEAMBOAT COMPANY—CONTRACT CARRIER APPLICATION

The Cornell Steamboat Company having filed an application under the provisions of section 309(f) of the Interstate Commerce Act for a permit to continue operations as a contract carrier by water; a hearing having been held; and full investigation of the matters and things involved having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It Is Hereby Certified, That the public convenience and necessity require the continuance of operation by applicant as a comomn carrier by water by towage of non-self-propelled freight-carrying vessels of others, in interstate or foreign commerce, between all points within the limits of New York Harbor, N. Y. and N. J., as those limits are defined in our order of March 26, 1941, and on the Hudson River between New York Harbor and Waterford, N. Y., and all intermediate points.

[fol. 55] It Is Ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.

It Is Further Ordered, That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act, and the orders, rules, and regulations of the Commission thereunder.

It Is Further Ordered, That this certificate and order shall take effect and be in force from and after July 24, 1942.

By the Commission, division 4.

W. P. Bartel, Secretary. (Seal.)

[fol. 56] EXHIBIT "D" TO PETITION

INTERSTATE COMMERCE COMMISSION

No. W-359

CORNELL STEAMBOAT COMPANY—CONTRACT CARRIER APPLICATION

Submitted October 21, 1942. Decided February 2, 1943.

Upon reargument, findings in prior report, 250 I. C. C. 301, that applicant is entitled to continue operation as a common carrier by water by towing vessels in the performance of towage of non-self-propelled freight-carrying vessels, loaded or light, within the limits of New York Harbor, N. Y. and N. J, on the Hudson River between New York Harbor and Waterford, N. Y., and all intermediate points, by reason of having been engaged in such operation on January 1, 1940, and continuously since, and that applicant's petition for dismissal of its application should be denied, modified. Corrected certificate issued.

Appearance as in prior report and *Christopher E. Heckman* for intervener.

REPORT OF THE COMMISSION ON REARGUMENT

BY THE COMMISSION:

In the prior report, 250 I. C. C. 301, division 4 found that applicant was entitled to continue operation as a common carrier by water of non-self-propelled freight-carrying vessels by means of towing vessels within the limits of New York Harbor, N. Y. and N. J., and on the Hudson River between New York Harbor and Waterford, N. Y., and all intermediate points, by reason of having been [fol. 57] engaged in such operation on January 1, 1940, and continuously since, and it issued a certificate of public convenience and necessity. The application was in form a petition for a permit under the provisions of section 309(f) of the Interstate Commerce Act authorizing continuance of operation as a contract carrier by water, but it further prayed that if the facts show that applicant, although applying for a permit, is entitled to a certificate, the application be considered as one of the appropriate form of author-

ity. The application was filed without prejudice to applicant's contention that in its performance of towage services for hire it is not a carrier and does not carry or transport any passengers or property, and that it is not subject to the act. On the same date applicant filed a petition to dismiss its application on the ground that, in the performance of its business of furnishing towage services, it does not engage in or perform or furnish any transportation of passengers or property within the language and intent of the provisions of part III of the act, and therefore is not subject to and does not come under the regulations of the act. Without prejudice to its request for dismissal upon those grounds, applicant further prayed that it be held exempt from and not subject to regulation insofar as its towage services are furnished wholly intrastate, to, from, and between points within the State of New York, irrespective of whether or not the vessels to which the towage services are so rendered are engaged in, or any cargoes or property on board those vessels are moving in, interstate commerce. Division 4 denied this petition. Upon petition of applicant, we reopened the proceeding for reargument, and postponed the effective date of the certificate and order to March 24, 1943. At the reargument applicant filed a supplemental brief. The facts are fully set forth in the prior report, and will be repeated here only to the extent necessary to an understanding of the matters herein discussed.

The same three questions are presented on the reargument as in the prior report: (a) Are towers to be regulated as carriers under part III of the act? (b) Is transportation by water between two ports in a single State but passing [fol. 58] through the waters of another State, within the jurisdiction conferred on this Commission by part III of the act? And (c) is applicant a contract carrier or a common carrier? These will be considered in the order stated.

Briefly stated, applicant's main contention is that towers who furnish towage services without assuming contractual obligations and liabilities as to the cargoes upon the vessels towed have for years been held by the courts not to be common carriers; and that therefore when Congress undertook by part III of the Interstate Commerce Act to regulate common carriers by water it must not be understood to have undertaken to regulate such towers. It is pointed out that under this form of towage the barge owners retain

possession and custody of the merchandise upon the barges, through their barge captains who accompany the barges.

Each of the cases in the line of court decisions relied upon involved a defense under section 3 of the Harter Act (46 U. S. C. 192), which provides:

> If the owner of any vessel transporting merchandise or property to or from any port in the United States of America, shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel.

Division 4 discussed representative cases. It is sufficient here to say that in those instances where the contract was for towage only of the loaded vessel, the court held that nothing in the agreement could be regarded as making the vessel or her cargo the cargo of the tug so as to make available to the tug owner the defense provided by the Harter Act. But where the contract was to transport merchandise by means of the barges and tugs of the tug owner, there was a contract of affreightment, the tug and barge became, [fol. 59] for the purpose of the voyage, one vessel, and the defense provided by the Harter Act was available to the tug owner. After discussing these cases, the division said:

> • • • Relating, as they do, to loss and damage, we do not accept them as determinative of the status of towers under part III of the act, which specifically provides in section 320(d) that:
>
> > Nothing in this part shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this part.
>
> In view of section 320(d), we consider that a finding that towers are carriers within the contemplation of part III would not affect their liability for loss or damage. Therefore the foregoing decisions may not be

construed as a bar to the regulation of towers under part III.

Division 4 also discussed at length applicant's numerous contentions, the facts, and the law respecting the definition of a common carrier by water under part III, what constitutes carriage or transportation under that part, the various paragraphs of the Interstate Commerce Act which might throw light on the intention of Congress with respect to the question here under consideration, and the broad purposes of part III. In fact, every contention raised by applicant on reargument and in its supplemental brief as to whether or not towers are brought within the scope of part III was fully discussed in the prior report. We concur in the conclusions of the division for the reasons set forth by it at length, and it would serve no useful purpose to repeat that reasoning herein. The finding that towers engaged in interstate towing for the general public are subject to part III of the act, except to the extent that specific exemptions are provided, is affirmed.

[fol. 60] Coming next to the question of whether transportation by water between two points in the same State, but passing through another State enroute, is within the jurisdiction conferred on this Commission by part III of the act: Division 4 discussed the various provisions of the act bearing upon this question, and illustrated the incongruous results that would follow the acceptance of applicant's contention that transportation of the character here considered is not made subject to our jurisdiction under part III.

In support of its contention that transportation between two ports in New York, but passing enroute through New Jersey, is not interstate commerce within the jurisdiction conferred on this Commission by part III of the act, applicant relies upon *Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549. That case involved a statute of the State of New York imposing a tax upon transportation corporations for the privilege of carrying on business in a corporate capacity within the State, equal to five-tenths of 1 percent of the gross earnings on transportation originating and terminating in the State of New York. The statute expressly provided that the tax would not apply on earnings derived from interstate business. The State assessed the tax on earnings from transportation between New York

ports but which passed through New Jersey waters, which traffic this applicant there contended was interstate and so not taxable by the State of New York. It was stated by applicant's counsel at the reargument herein that there is substantially no difference in the way the traffic is handled now and the way it was handled then as described in that opinion; and the facts of record, recited in the report of division 4, tend to support that conclusion. The traffic was described in the opinion of the Court in the following language:

> Tows for up-river points on the Hudson River are made up at a stakeboat located at Weehawken, within the territorial limits of the State of New Jersey; that there are two stakeboats anchored in the river just below Weehawken ferry; that vessels and boats reported for the up-river tows are taken out to the stakeboats and there made fast, and the tow is there made up, [fol. 61] the towing vessels are attached, and the course pursued by the steamers in going up the river is in the territory of New York and New Jersey; that tows coming down the river pursue a like course, going into the territory of both States, and when the tow arrives in New York harbor, the entire tow, or the greater part thereof, is, as a usual thing, turned in the river, going into the territory of New Jersey and making the turn. Deponent further says that nearly all earnings of the company are from business done within the territorial limits of New York and New Jersey, to such extent as the State of New Jersey is included in the Hudson River and New York Bay, and that it is absolutely impossible to state just when the vessels are within the territorial limits of either State.

The court held that the tax was not a charge upon the navigation of the river, but was upon the doing of business as a corporation of the State within the State. In the course of its opinion the court said:

> Transportation between the ports of the State is not interstate commerce, excluded from the taxing power of the State, because as to a part of the journey the course is over the territory of another State. *Lehigh Valley Railroad* v. *Pennsylvania*, 145 U. S. 192; *Ewing* v. *City of Leavenworth*, 226 U. S. 464. • • •

> We are of the opinion that commerce thus carried on is not interstate commerce, beyond the taxing power of the State, and that the return on which the tax was assessed did not involve the revenues of commerce among the States.

It will be seen that the court indicated that it was following *Ewing* v. *Leavenworth*, 226 U. S. 464. That case involved the constitutionality of a license tax on express companies for receiving and sending packages between points within the State of Kansas, levied by the city of [fol. 62] Leavenworth, Kans. The route of the express company from Leavenworth passed over into the State of Missouri, and thence back into Kansas. The contention was therefore made that the tax was a regulation of and burden upon interstate commerce. The court said that the case was controlled by *Lehigh Valley Railroad* v. *Pennsylvania*, 145 U. S. 192, and distinguished the taxing power from the power of regulation of transportation. We quote:

> It is contended, however, that the contrary result must be reached, applying the principles laid down in *Hanley* v. *Kansas City Southern Ry. Co.*, 187 U. S. 617. In that case this court declared unconstitutional a law of Arkansas undertaking to fix rates upon railway transportation, the transportation in question in that case being a single carriage partly outside of the State of Arkansas from a point within to another point within the State. In the particular instance the transportation covered 116 miles, of which only 52 miles were within Arkansas and the rest without the State. It was held that the right to regulate such commerce was solely in Congress under the Constitution, and that the transportation was a single and entire thing and as a subject for rate legislation was indivisible. The case of *Lehigh Valley Railroad* v. *Pennsylvania, supra*, was called to the attention of the court, and of that case this court said (p. 621):
>
> "That was the case of a tax and was distinguished expressly from an attempt by a State directly to regulate the transportation while outside its borders. 145 U. S. 204. And although it was intimated that, for the purposes before the court, to some extent commerce by transportation might have its character fixed by the

relation between the two ends of the transit, *the intimation was carefully confined to those purposes.* Moreover, the tax 'was determined in respect of receipts for the proportion of the transportation within the State.' 145 U. S. 201. *Such a proportioned tax had been sustained in the case of commerce admitted* [fol. 63] *to be interstate. Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217. Whereas it is decided, as we have said, that when a rate is established, it must be established as a whole."

The distinction is applicable here. There is no attempt to fix a rate by the authority of the State, which, while single and complete in itself, covers for a considerable part interstate transportation. The privilege tax levied in this case expressly excludes commerce of an interstate character or business done for the Government, and is levied solely on the business done in the City of Leavenworth in receiving packages from points within the State and in transporting packages to like points. Applying the principles of the *Lehigh Valley Case* to such a situation we are of opinion that, *for the purpose of a privilege tax for business thus done,* the municipality, acting under authority of the State, did not exceed its just power. (Emphasis added.)

We conclude that the right of the State of New York to impose a franchise tax based in part upon revenues from business between two ports of that State but which passes through the State of New Jersey, is clearly distinguished from, and constitutes no bar to, the exercise of jurisdiction by this Commission to regulate such interstate transportation.

At the reargument, and in its supplemental brief filed at that time, applicant, while admitting that the geographical boundary between New Jersey and New York follows the middle of the river (4 Stat. L. 708), urges that the State of New York has jurisdiction over the waters of the Hudson River lying west of Manhattan Island to the low-water mark on the New Jersey shore, under an agreement entered into by the two States in 1833. That agreement was ratified by the legislatures of the two States and approved by Congress. It fixes the boundary at the middle of the river and bay, but grants to the State of New York exclusive jurisdiction [fol. 64] over all the waters of the Bay of New York and of

the Hudson River lying west of Manhattan Island and to the south of the mouth of Spuyten Duyvil Creek to low-water mark on the New Jersey side thereof, subject to certain specified rights of property and of jurisdiction of the State of New Jersey, one of which is the exclusive right of property in and to land under the water lying west of the middle of the bay and river; a second is that the State of New Jersey shall have exclusive jurisdiction over wharves, docks, and improvements on the shore of that State, and over all vessels aground or fastened to any wharf or dock on that shore, except that said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers of the State of New York; and another is the regulating of fisheries west of the middle of said waters. This agreement is referred to, and its provisions are set forth in *The People* v. *Central R. Co. of N. J.*, 42 N. Y. 283. The court there, referring to the second exception, said:

> This exception explains the object and nature of the jurisdiction intended to be given to New York. It was to be a police jurisdiction of and over all vessels, ships, boats or craft of every kind that did or might float upon the surface of said waters, and over all the elements and agents or instruments of commerce, while the same were afloat in or upon the waters of said bay and river for quarantine and health purposes, and to secure the observance of all the rules and regulations for the protection of passengers and property, and all fit governmental control designed to secure the interests of trade and commerce in said port of New York, and preserve thereupon the public peace.

Respecting the asserted jurisdiction of the State of New York to decide what is an obstruction upon those waters, the court said:

> The jurisdiction asserted for this State really belongs to the general government. In the case of the [fol. 65] *State of Pennsylvania* v. *The Wheeling Bridge Company and others* (13 How. U. S. 579) Chief Justice Taney said: "The Ohio being a public navigable stream, congress has undoubtedly the power to regulate commerce upon it."

From the north end of Manhattan Island northward to the point where the northern boundary of New Jersey

reaches the Hudson River is some 7 or 8 miles. Applicant therefore asserts that only for this distance would its traffic be outside the waters that are under the jurisdiction of the State of New York. It is not necessary for us to pass upon the question of whether the movement of applicant's traffic through the waters of the western half of the Hudson River lying west of Manhattan Island constitutes it interstate commerce, although this applicant in *Cornell Steamboat Co.* v. *Sohmer, supra,* contended that it was such, since concededly movement through the waters of the western half of the river north of Manhattan Island is through waters under the jurisdiction of the State of New Jersey. The interstate character of applicant's traffic is determined, not by the number of miles that it moves outside the State of New York, but by the fact that it *does* move outside the State.

The finding and certificate of division 4 embrace transportation within the limits of New York Harbor. It is clear that as to towage performed by applicant wholly within New York Harbor applicant is not a party to any arrangement for the through carriage of such barges or the cargoes therein from or to points without the State. In section 303(g) of the act it is provided that the provisions of part III shall not apply to transportation in interstate commerce by water solely within the limits of a single harbor or between places in contiguous harbors, when such transportation is not part of a continuous through movement under a common control, management, or arrangement to or from a place without the limits of any such harbor or harbors. Applicant therefore requires no certificate for such transportation as it performs entirely within New York Harbor, and the certificate will be corrected accordingly.

[fol. 66] We affirm the conclusion of division 4 that transportation between two points in the State of New York, passing through New Jersey territorial waters en route, is within the jurisdiction conferred on this Commission by part III of the act.

Coming finally to the question of whether applicant is a contract carrier or a common carrier: Division 4 recited at length the facts bearing upon this question, even going to the length of quoting some of the testimony. The evidence, as recited by the division, warrants the ultimate finding of fact that applicant holds itself out to the public

to tow for anyone with ability and willingness to pay for the service, and the conclusion that such a holding out, accompanied by performance, constitutes one a common carrier.

The division set forth six numbered paragraphs of findings of fact, which we find to be fully supported by the evidence. We adopt those findings as our own and they are by reference made a part of this report. Upon those facts we affirm the conclusion of the division that applicant was in bona fide operation on January 1, 1940, in interstate commerce as a common carrier by towing vessels in the performance of towage of non-self-propelled freight-carrying vessels, loaded or light, between points within New York Harbor, N. Y. and N. J., as that harbor is defined in our order of March 26, 1941, entered in Ex Parte No. 140, and Waterford, N. Y., and intermediate points on the Hudson River; that such operation has been continued since that date; and that applicant is entitled under the "grandfather" clause of section 309(a) of the act to a certificate of public convenience and necessity authorizing continuance of such operation, subject, however, to general conditions which are necessary to carry out, with respect to continuation of applicant's operations, the requirements of part III of the act, and the orders, rules, and regulations of the Commission thereunder.

We further affirm the division's denial of applicant's petition to dismiss the application.

A corrected certificate and order will be issued.

[fol. 67] JOHNSON, *Commissioner*, concurring in part:

Generally speaking, the Hudson River forms the boundary between New York and New Jersey. The geographical boundary follows the middle of the river, but under an agreement entered into between the two States New York is granted police jurisdiction to the low-water mark on the New Jersey side. Tows for up-river points on the Hudson River are made up at a stakeboat located at Weehawken, within the territorial limits of the State of New Jersey, but such tows originate in New York and are destined to points in New York; they merely pass through the territorial waters of New Jersey. With respect to the transportation performed by this applicant, the Supreme Court has held that "Transportation between the ports of the

State is not interstate commerce, excluded from the taxing power of the State, because as to a part of the journey the course is over the territory of another State." *Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549. For commercial purposes the entire river may be considered the boundary line between the two States. I am, therefore, of the opinion that the transportation here involved is not interstate for the purposes of regulation under the Water Carrier Act.

I am authorized to state that COMMISSIONER LEE joins in this expression.

SPLAWN, *Commissioner*, dissenting:

Applicant has been engaged in the towage business for many years, operating between points in New York and New Jersey within New York Harbor and between New York and points on the Hudson River. Applicant enters into individual contracts in connection with each towage operation. Its charges depend upon the weight of the tow and also whether other ships are towed at the same time. The charges have no relation to the lading on the towed ship and applicant undertakes no responsibility with respect to loss or damage of the towed ship or cargo. Applicant does not hold itself out to transport any commodities [fol. 68] or property, but is willing to enter into contracts with any person or persons desiring its services within the area of its operations.

Although it has filed this application for authority under part III of the Interstate Commerce Act, applicant denies that we have jurisdiction over its operations. It is conceded that applicant's towboats constitute transportation facilities within the meaning of section 302(h) of part III, but it is denied that applicant is a common carrier by water within the meaning of section 302(d). We have found only carriers by water are subject to regulation under part III even though transportation facilities may be furnished by other persons. See *Status of Wharfingers*, 251 I. C. C. 613.

Prior to the enactment of part III, the common law was to the effect that companies engaged in the business of towage were not carriers or charged with the liabilities or entitled to the benefits of laws pertaining to carriers. The reason was that such companies did not enter into con-

tracts of affreightment, but merely agreed to perform specific towage operations. Where, however, the tower also controlled the towed ship containing the lading and entered into contracts with respect thereto, the two ships, one furnishing the motive power, the other the support for the lading, constituted a vessel within the meaning of the Harter Act, relieving carriers from liability for loss or damage when proper equipment had been furnished. *Sacramento Navigation Co.* v. *Salz*, 273 U. S. 326, 331. The protection of this statute ran to "any vessel transporting merchandise or property" and the tug and barge combined were held to constitute such a vessel. The findings in the report do not bring applicant within this special class of towers controlling the towed ships.

Another exception is illustrated by operators of towboats towing logs in Puget Sound and adjacent waters. In *Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 207, 211, it was held, "In all essential particulars, that service is like the carriage of freight in vessels." With these exceptions, the [fol. 69] law has not regarded operators of towboats to be carriers.

There is nothing in part III to support the conclusion that Congress intended to change the common law with respect to towboats. The only reference to towage is in section 303(f) which exempts any towage performed for carriers and requires that regulation be through the respective rail, motor, or water carrier, as the case may be. This provision furnishes no basis for the conclusion that Congress intended that towboats, as such, not engaging in the transportation of commodities or entering into contracts of affreightment, should be held to be carriers subject to regulation. The undertaking of applicant herein is to render specific services and not to transport goods or property. In the absence of any clear language in the statute declaring towboats to be carriers, and the doubtful constitutionality of such a declaration or construction, I would find that the common law rule still prevails, and that ordinary towage, such as performed by applicant, is not transportation or carriage, subject to part III.

Likewise it seems to me that applicant is not subject to regulation under part III because it is not engaged in interstate commerce as defined therein. It is conceded that its operations within New York Harbor are exempt under our order of March 26, 1941, in Ex Parte No. 140. The only

color of jurisdiction lies in the fact that the transportation between points in New York at times probably crosses the thread of the stream and is thus within the jurisdiction of the State of New Jersey. Section 302(i)(1) defines interstate transportation for the purposes of part III as being "wholly by water from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States." Under this definition transportation between two points in the State of Washington would not be in interstate commerce if the vessel had to pass through Canadian waters. No reason appears for giving any broader construction to this section if the vessel happens to pass through the waters of any other State.

[fol. 70] The conclusion in the report rests almost entirely upon the alleged similarity with the provisions of part I. This analogy is unsound because the exact routes of water carriers are indefinite as compared with railroads, particularly where the waterway constitutes a boundary, and because part I was not the result of a single enactment but rather the consequence of many statutes and much interpretation. In the enactment of parts II and IV, the Congress for the purposes of those parts, has specifically included within the definition of interstate commerce, transportation between points within the same State through another State. The failure to include a similar provision in part III can mean only that Congress intentionally limited jurisdiction to transportation between points in different States. This construction is also consistent with the fact that part III contains numerous exceptions and exemptions which are evidence of the Congressional intent to confer more limited jurisdiction than has been given in the other ports of the act.

For the reasons given above, I think that the application should be dismissed for lack of jurisdiction.

PATTERSON, *Commissioner*, dissenting:

The majority finds that applicant, when towing non-self-propelled freight-carrying vessels for the general public, is a common carrier of said vessels. Many of these vessels are loaded but there is no finding that applicant is a common carrier of the commodities with which they are loaded. The theory of the majority appears to be that there is a relation of common carrier and shipper so far as the vessels are concerned, but not as to the cargo on the vessels. Un-

der the finding applicant will have to publish rates for towing vessels but not rates for the transportation of the numerous commodities on the vessels. A vessel, like a freight car, is a facility used to transport goods. It seems to me anomalous to hold that one is a common carrier of the facility and not to find that it is a common carrier of the goods therein.

[fol. 71] It seems clear that prior to the enactment of part III of the act, an independent tower operating as does applicant was not considered a carrier under the law. Applicant's tugs are merely motive power used for the same purpose as horses or tractors might be used, and nothing more. Whether the motive power is attached to the vessel or operated as a separate unit is immaterial. I believe that Congress did not intend to and did not bring such towers under our jurisdiction. I also believe that if applicant were a common carrier under part III, it would be a common carrier of the goods on the vessels which it tows.

[fol. 72] EXHIBIT "E" TO PETITION

Certificate and Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 2nd day of February, A. D. 1943.

No. W-359

CORNELL STEAMBOAT COMPANY—CONTRACT CARRIER APPLICATION

It appearing, That on June 15, 1942, division 4 made and filed its report and issued its certificate and order in the above-entitled proceeding, and that on August 10, 1942, the Commission, by appropriate order, reopened this proceeding for reargument;

It further appearing, That this proceeding has been reargued, and that the Commission, on the date hereof, has made and filed its report on reargument containing its further findings of fact and conclusions thereon, which said report on reargument and the aforesaid report of June 15, 1942, are hereby referred to and made parts hereof:

It is hereby certified, That the public convenience and necessity require the continuance of operation by Cornell

Steamboat Company as a common carrier by water by towing vessels in the performance of towage of non-self-propelled freight-carrying vessels, loaded or light, in interstate or foreign commerce, between points within New York Harbor, N. Y. and N. J., as that harbor is defined in our order of March 26, 1941, in Ex Parte No. 140, and Waterford, N. Y., and intermediate points on the Hudson River.

It is ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, [fol. 73] however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.

It is further ordered, That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act, and the orders, rules, and regulations of the Commission thereunder.

It is further ordered, That the petition of applicant to dismiss the application be, and it is hereby, denied.

It is further ordered, That the aforesaid certificate and order of June 15, 1942, as subsequently postponed, to March 24, 1943, be, and it is hereby, vacated and set aside.

And it is further ordered, That this certificate and order, dated February 2, 1943, shall take effect and be in force from and after May 11, 1943.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 74] In the District Court of the United States

[Title omitted]

Answer of the United States of America—Filed May 26, 1943

Now comes the United States of America, defendant herein, and in answer to the petition says:

1. Admits the allegations of paragraphs I through III of the petition herein, except that it alleges that the effective date of the Commission's order, which was originally May 11, 1943, as alleged in paragraph III, has now been extended to July 11, 1943.

2. Denies the allegations of paragraphs IV through X of the petition to the extent that they are inconsistent with the findings made by the Commission in its reports herein of June 15, 1942 and February 2, 1943 (Plaintiff's Exhibits C and D), to which the court is referred for a more complete statement of the facts.

3. Admits that, as alleged in paragraph XI of the petition, the Commission was granted regulatory jurisdiction over common and contract carrier by water by the Transportation Act of 1940 (54 Stat. 952). The court is referred to that statute for a more complete statement of its provisions. The remaining allegations of paragraph XI are conclusions of law and require no answer.

4. Admits the allegations of paragraphs XII through XVI of the petition, except that it alleges that the effective date of the order is no longer May 11, 1943, as alleged in paragraph XVI, but instead July 11, 1943.

[fol. 75] 5. Denies each and every allegation of paragraph XVII of the answer.

6. Denies that the Commission's order subjects plaintiff to irreparable injury, as alleged in paragraph XVIII of the petition, but alleges that that is immaterial in view of the fact that this is a statutory rather than a strictly equitable proceeding. Further alleges that the United States does not challenge the standing of plaintiff to maintain this suit.

Wherefore it is respectfully prayed that the petition be dismissed and the validity of the Commission's decision be sustained.

Robert L. Pierce, Special Assistant to the Attorney General, Department of Justice, Washington, D. C., Counsel for the United States.

Tom C. Clark, Assistant Attorney General.

May 25, 1943.

Certificate of Service

I hereby certify that I served a copy of the above answer upon each of the following named counsel by mailing them a copy thereof this 25th day of May, 1943:

Kirlin, Campbell, Hickox, Keating & Grann, 120 Broadway, New York, New York.

E. M. Reidy, Esq., Interstate Commerce Commission, Washington, D. C.

Foley & Martin, 64 Wall Street, New York, New York.

Robert L. Pierce.

[File endorsement omitted.]

[fol. 76] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed May 24, 1943

The Interstate Commerce Commission, intervening defendant in the above-entitled suit, for answer to the petition heretofore filed in this case, answers and says:

I

Answering the allegations of paragraphs I to III, inclusive, of the petition, the Commission admits the same, except that the Commission alleges that the effective date of its order is now July 11, 1943, and not May 11, 1943, as set forth in paragraph III of the petition. For more full and complete information concerning the contents of the Commission's certificate and order dated February 2, 1943, than is contained in said paragraph III, the Commission respectfully refers the court to a copy of said certificate and order, [fol. 77] annexed to and made a part of the petition as Exhibit E.

II

Answering the allegations of paragraphs IV to XVI, inclusive, of the petition, the Commission admits and alleges that it made and entered the report and order of June 15, 1942, annexed to and made a part of the petition as Exhibit C, in a proceeding then pending before it entitled Docket No. W-359; that said proceeding was instituted by the Commission as the result of an application filed with it on May 21, 1941, by the petitioner herein, seeking a permit under the provisions of Section 309(f) of the Interstate Com-

merce Act, authorizing continuance of operation as a contract carrier by water in interstate or foreign commerce, or other appropriate form of authority, in furnishing under individual contracts or agreements the services of its fleet of tugboats in towing barges, scows, and similar vessels carrying cargoes either below or on deck, from or to all points on the Hudson River between Waterford, N. Y., and New York, N. Y., Harbor points located in New York or New Jersey on the waters of the lower Hudson River, and the adjacent waters of New York Harbor; that subsequently full hearings were had upon said application, and thereupon the Commission made and entered and served upon all parties to said proceeding the report of Division 4, referred to in paragraph XIV of the petition; that following the service of said report of June 15, 1942, the Commission, upon petition for that purpose duly made, reopened the pro-
[fol. 78] ceeding for oral argument before the entire Commission on October 21, 1942; that following said oral argument the entire Commission issued its report and order dated February 2, 1943, attached to the petition and made a part thereof as Exhibit D, to which the Commission refers the court for a full and complete discussion of the reasons for the Commission's decision.

Further answering the allegations of paragraphs IV to XVI, inclusive, of the petition, the Commission admits and alleges that in said proceedings the parties thereto, including the plaintiff herein, were, and each of them was, accorded the full hearing provided by the Interstate Commerce Act; that in said hearing testimony and other evidence bearing upon the matters covered in said reports and orders was submitted to the Commission for consideration; that at said hearing and subsequently, both orally and in briefs filed in said proceeding, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including many of the particular questions raised by plaintiff in this suit, whereupon the Commission determined said matters and entered and served upon all the parties to said proceeding, including the plaintiff herein, its said reports and orders of June 15, 1942 and February 2, 1943; that said reports and orders of June 15, 1942 and February 2, 1943, included the Commission's findings of fact, conclusions and requirements in the premises

and that, upon the evidence aforesaid, and as shown in and by said reports, the Commission made the findings and stated the conclusions upon which its order was based.

[fol. 79] The Commission further alleges that the findings and conclusions in said reports of June 15, 1942 and February 2, 1943, were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceeding as aforesaid.

The Commission further alleges that in making said reports, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceedings by their respective counsel, including many of the matters covered by the allegations of the petition herein.

The Commission further alleges that said reports and orders of June 15, 1942, and February 2, 1943, were not made or entered either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them; that in making said orders the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in the petition.

III

Further answering the allegations of paragraph X of the petition, the Commission denies the same.

IV

Further answering the allegations of paragraph XI of the petition, the Commission admits that by the Transportation Act of 1940, approved September 18, 1940, it was empowered to regulate carriers by water in interstate commerce. The Commission respectfully refers the court to the provisions of said Act for more full and complete information [fol. 80] concerning the duties placed upon it by said Act, than is contained in said paragraph XI.

V

Further answering the allegations of paragraph XII of the petition, the Commission admits the same.

VI

Further answering the allegations of paragraph XIII of the petition, the Commission admits that on October 3, 1941, petitioner's President, Frederick Coykendall, Esq., testified before Examiner Wilkins, and that on or about January 15, 1942, said examiner filed his proposed report, which is annexed to and made a part of the petition as Exhibit B.

VII

Further answering the allegations of paragraph XIV of the petition, the Commission admits the same, except that it refers the court to its opinion, certificate and order dated June 15, 1942, annexed to and made a part of the petition as Exhibit C, for a more full and complete statement of its findings and conclusions than is contained in said paragraph XIV.

VIII

Further answering the allegations of paragraph XV of the petition, the Commission admits the same, except that it refers the court to its report and decision of February 2, 1943, annexed to and made a part of the petition as Exhibit D, for a more full and complete statement of its findings and conclusions than is contained in said paragraph XV.

[fol. 81]

IX

Further answering the allegations of paragraph XVI of the petition, the Commission admits the same, except that it alleges that the effective date of its order has been extended from May 11, 1943, to July 11, 1943.

X

Further answering the allegations of paragraph XVII of the petition, the Commission denies the same.

XI

Except as herein expressly admitted, the Commission denies each of and all the allegations contained in the petition, in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said reports and orders of June 15, 1942, and

February 2, 1943, referred to and made a part of the petition as Exhibits C and D, respectively, which reports and orders are hereby referred to and made parts hereof.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said petition be dismissed.

Interstate Commerce Commission, By E. M. Reidy, Assistant Chief Counsel.

Daniel W. Knowlton, Chief Counsel, Of Counsel.

[fol. 82] *Duly sworn to by J. Haden Alldredge. Jurat omitted in printing.*

[fol. 82a] [File endorsement omitted.]

[fol. 83] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

INTERVENTION OF INTERSTATE COMMERCE COMMISSION—Filed May 24, 1943

To the Honorable the Judges of said court:

In accordance with the provisions of section 212 of the Judicial Code, 36 Stat. L. 1150 (U. S. Code, Tit. 28, Sec. 45a), providing, in part, "that the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement," we hereby enter the appearance of the Interstate Commerce Commission as a party defendant, and of ourselves as its counsel, in the above-entitled suit.

Interstate Commerce Commission, by Daniel W. Knowlton, Chief Counsel. E. M. Reidy, Assistant Chief Counsel.

May 22, 1943.

[fol. 84] [File endorsement omitted.]

[fol. 85] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION OF NATIONAL WATER CARRIERS ASSOC., INC., FOR LEAVE TO INTERVENE AND ORDER THEREON

Sirs:

Please take notice that upon the annexed affidavit of Chester H. Sanders, verified the 3rd day of May, 1943, National Water Carriers Association, Inc., will move this Court at a term thereof to be held for the hearing of motions in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York, on the 11th day of May, 1943, at 10:30 A. M., on that day or as soon thereafter as counsel can be heard, for an order allowing National Water Carriers Association, Inc., to intervene in this proceeding and for such other and further relief in the premises as to the Court may seem just and proper.

Dated: New York, May 3, 1943.

Yours, etc., Foley & Martin, Attorneys for Intervenors, 64 Wall Street, New York City.

To:

Messrs. Kirlin, Campbell, Kickox, Keating & McGrann, Attorneys for Plaintiff, 120 Broadway, New York City.

Attorney General of the United States, Washington, D. C.

Secretary of the Interstate Commerce Commision, Washington, D. C.

United States Attorney, Southern District of New York, Foley Square, New York City.

[fol. 86] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT

CHESTER H. SANDERS, being duly sworn, deposes and says:

He is President of National Water Carriers Association, Inc.

This affidavit is made in support of an application by said National Water Carriers Association, Inc., for leave to intervene in the above entitled proceedings.

National Water Carriers Association, Inc., a New York corporation, is the duly authorized successor to Atlantic Coastwise & Inland Water Carriers Association, Inc., a New York corporation. National Water Carriers Association, Inc., is a non-profit sharing association, whose members consist of persons, firms and corporations engaged in the transportation by water of goods for hire. A large number of the members of said Association are interested in and will be affected by the Court's decision on the questions of law involved in this proceeding. Some of the questions of law raised by the plaintiff's petition will have a nationwide effect inasmuch as the Court is asked to construe the various sections of Part III of the Interstate [fol. 87] Commerce Act. Moreover, a number of the members of National Water Carriers Association, Inc., have business relations with the plaintiff herein and aside from the academic interest in the legal questions involved these members will be actually affected by the decision on the question that the plaintiff may be determined to be within the jurisdiction of the Interstate Commerce Commission.

Atlantic Coastwise & Inland Water Carriers Association, predecessor to National Water Carriers Association, Inc., was permitted to and did intervene in the proceedings before the Interstate Commerce Commission which led to the decision made, the order entered and the certificate issued to plaintiff by the Interstate Commerce Commission. When National Water Carriers Association, Inc., succeeded its predecessor said National Water Carriers Association, Inc., continued to take an active part in the proceedings before the Interstate Commerce Commission involving this plaintiff. The said Association was represented at the hearing and argument before the entire Commission and its counsel made oral argument.

Wherefore, deponent respectfully prays that an order be entered permitting National Water Carriers Association, Inc., to intervene in this proceeding.

Chester H. Sanders.

Sworn to before me this 3rd day of May, 1943. Louis E. Greco, Notary Public, Queens County. (Seal.)

[fol. 88] [Affidavits of service omitted in printing.]

[fol. 89] IN UNITED STATES DISTRICT COURT

ORDER—June 9, 1943

The applicant is permitted to submit a brief and appear as an amicus curiae, and at the end of the hearing to renew its application to intervene.

6/9/43.

J. N. F., U. S. C. J.; A. S. C., D. J.; J. B., U. S. F. J.

[fol. 90] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF BOSTON TOW BOAT COMPANY TO INTERVENE—Filed September 15, 1943

Now comes Boston Tow Boat Company, petitioner herein, and says:

First: Petitioner is a Massachusetts corporation with its principal place of business in Boston, Massachusetts, and is the operator of fifteen (15) tugs engaged in harbor, bay and coastwise towing and in rendering such other services as are customarily rendered by tugs to other vessels and floating equipment.

Second: Petitioner intervened in and was a party of record to the proceedings brought by Cornell Steamboat Company, plaintiff herein, before the Interstate Commerce Commission.

Third: Petitioner is aggrieved by the decision of said Commission in the said proceedings before said Commission involving the status of Cornell Steamboat Company, insofar as said decision holds that towers for hire are carriers and subject to the terms and provisions of Part III of the Interstate Commerce Act.

Fourth: By application filed May 28, 1941, petitioner sought a permit under the provisions of Section 309(f) of the Interstate Commerce Act authorizing the continuance of its operation as a contract carrier by water in the performance of general towage between ports and points on

[fol. 91] the Atlantic Coast and tributary waters from Calais, Maine, to New York Harbor, and in the alternative a certificate, (if petitioner were found to be a common carrier,) all without prejudice to petitioner's contention that towers for hire are not carriers and not subject to the terms and provisions of said Act. After certain intermediate proceedings, Division 4 of said Commission decided on May 22, 1943, that petitioner is a common carrier and is entitled to a certificate authorizing it to continue operation "as a common carrier by towing vessels in the performance of general towage, in interstate or foreign commerce, between ports and points on the Atlantic coast north of and including New York Harbor and contiguous harbors as defined by [said Commission's] order of March 26, 1941, in Ex Parte No. 140, * * * and tributary waters other than the Hudson River above the New York Harbor area and the New York State Canal System."

Fifth: Petitioner has contended throughout the course of its proceedings before said Commission, and still contends, that as a tower for hire it is not subject to the terms and provisions of said Interstate Commerce Act, more particularly Part III thereof. This issue has been squarely raised by Cornell Steamboat Company in these proceedings; and petitioner desires to participate in these proceedings solely for the purpose of asserting herein its said contentions regarding such jurisdictional issue. The facts underlying petitioner's operations as a tower for hire (except the fact that petitioner *is* a tower for hire) are somewhat different from the facts underlying the operations of Cornell Steamboat Company; wherefore petitioner believes that no useful purpose would be served by having its intervention relate to any issues other than such jurisdictional issue.

[fol. 92] Sixth: Petitioner files this petition pursuant to authority contained in U. S. Code, Title 28, Section 45a (Judicial Code, Sections 212 and 213) providing (*inter alia*) " * * * That * * * corporations * * * who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Com-

merce Commission, may intervene in said suit or proceedings at any time after the institution thereof; * * *"

WHEREFORE, petitioner prays that it be allowed to intervene in and become a party to the above entitled proceedings; and for such other and further relief as it may be entitled to receive in the premises.

Boston Tow Boat Company, by Bingham, Dana & Gould, Attorneys, 1 Federal Street, Boston, Mass. Charles S. Bolster, Attorney at Law and Registered Practitioner before the Interstate Commerce Commission.

SUPPORTING AFFIDAVIT

I, Charles S. Bolster, on oath depose and say:

I reside at Cambridge, Massachusetts, and am a partner in the firm of Bingham, Dana & Gould, with offices at 1 Federal Street, Boston, Massachusetts, attorneys for Boston Tow Boat Company, petitioner to intervene in the above entitled proceedings; I am personally acquainted with the nature and progress of the proceedings before [fol. 93] said Interstate Commerce Commission relative to the status of said Boston Tow Boat Company under the Interstate Commerce Act; I have read the foregoing petition and the statements therein contained are true; I was associated with Seymour P. Edgerton, Attorney at Law and Registered Practitioner before said Commission, during the progress of said proceedings before said Commission and prepared and signed, with Mr. Edgerton, certain of the papers and briefs which were filed in support of petitioner's contentions before said Commission; said Seymour P. Edgerton was then senior counsel for petitioner in said proceedings, but he is now on the legal staff of War Shipping Administration and I have become counsel for petitioner in his stead.

Charles S. Bolster.

Subscribed and sworn to at said Boston this twenty-first day of June, 1943, before me, Miles Wam——, Notary Public. My Commission expires March 17, 1945. (Seal.)

[fol. 94] [File endorsement omitted.]

[fol. 95] Secretary's Certificate to following transcript omitted in printing.

Filed May 21, 1941

APPLICATION

For

☐ CERTIFICATE AS COMMON CARRIER BY WATER

☒ PERMIT AS CONTRACT CARRIER BY WATER

SUBJECT TO THE INTERSTATE COMMERCE ACT

(Before answering, read general instructions attached hereto.)

BEFORE THE INTERSTATE COMMERCE COMMISSION

Application of CORNELL STEAMBOAT COMPANY
(Name) (Trade Name)

a corporation under the laws of the State of New York
(Status as individual, partnership, association, corporation, fiduciary, etc. If a corporation, name the State of incorporation. If a partnership, give names and addresses of all partners. If an association or corporation, attach a list of names and addresses of directors and officers.)

22 Ferry Street, Kingston, New York
(Street address) (City) (State)

Application below is for the appropriate authority to: (check applicable status)

☒ to continue an operation in existence January 1, 1940, and continuously thereafter } ☐ common carrier } ☐ passengers

☐	in existence January 1, 1940, and continuously thereafter	☐ common carrier	☐ passengers
☐	to continue an operation not existing January 1, 1940, but existing February 1, 1941	☒ contract carrier	☒ property

as a ... of

by water in interstate or foreign commerce (as defined in section 302(i))

Application for certificate as common carrier of property covers

☐ all commodities

☐ commodities with exceptions as detailed in Exhibits "A" or "B"

Application for a contract carrier permit of property covers

☒ all commodities with exceptions as detailed in Exhibits "A" or "B"

☐ specific commodities as detailed in Exhibits "A" or "B"

Application covers ☐ regular routes

☒ irregular routes

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BMC 2b

71

Operation is ☒ year around in New York Harbor

☒ seasonal between March (month) and December (month).
on Hudson River

In support of this application, applicant submits the following exhibit attached hereto and made a part hereof:

☒ Exhibit "A" ☐ Exhibit "B"
(See General Instructions)

Applicant will furnish such additional information to substantiate the applicant's prayer as the Commission may require.

Applicant has complied with the order of the Commission relative to the service on interested parties, as shown below.

Applicant reserves the right to claim exemption from any and all provisions of Part III of the Interstate Commerce Act, the filing of this application not being deemed a waiver thereof, and the operations, if any, which applicant believes to be exempt are those described below:

(If exemption is claimed in respect of any operations applicant should here describe such operations, and in each instance make reference to the statutory provision or provisions under which the exemption is claimed)

This application is filed without prejudice to applicant's contention that it is not a carrier and does not transport any passengers or property and that for the foregoing reasons and other reasons it is not subject to Part III of the Interstate Commerce Act.

WHEREFORE, The applicant herein prays: That the Commission issue a permit (Certificate)(Permit) to operate as a (Common Carrier) contract carrier of property generally (Contract Carrier (Passengers)(Property generally, or with exceptions, or specific commodities only, as detailed in Exhibits "A" or "B")

and applicant further prays that if the facts herein contained show that applicant, although applying for a permit (Certificate)(Permit), is entitled to a certificate (Permit)(Certificate), this application be considered one for the appropriate form of authority.

Dated this 16th day of May, 1941.

CORNELL STEAMBOAT COMPANY
(Applicant)

By Irving Corkindall (Title) President

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OATH

State of NEW YORK } ss:
County of NEW YORK }

FREDERICK COYKENDALL makes oath and says that he
(Name of affiant)

is the President of the Cornell Steamboat Co.; that he
(Title of affiant) (Name of applicant)
is authorized on the part of said applicant to verify and file with the Interstate Commerce Commission this application and exhibits attached hereto and made a part hereof; that he has carefully examined all of the statements contained in such application and the exhibits attached thereto and made a part thereof; that he has knowledge of the matter set forth therein, and that all such statements made and matters set forth therein are true and correct to the best of his knowledge, information, and belief.

Frederick Coykendall

Subscribed and sworn to before me, a notary public in and for the State and county above named, this 16th day of May, 1941.

(SEAL)

Lucia Davis.
NOTARY PUBLIC
ROCKLAND COUNTY
CERTIFICATE FILED IN NEW YORK COUNTY
CLERK'S No. [illegible] REGISTER'S No. 3F201
TERM EXPIRES MARCH 30, 1943

My commission expires _____

CERTIFICATE OF SERVICE

A copy of this application has been served by receipted mail on the Governors of the following States:

NEW YORK and NEW JERSEY

A notice of the filing of this application (Form B.W.C. 5) has been served by receipted mail on the following known water-line competitors:

See "Schedule I" annexed hereto

Postal receipts or certificates of mailing covering the above are attached hereto.

Date May 20th 1941. Signed Cornell Steamboat Company

By Frederick Coykendall
President

BWC 24

th provisos of section 309(a) or 309(f) of the Interstate Commerce Act.)

CORNELL STEAMBOAT COMPANY
(Name of Applicant)

Except as otherwise noted, the following information is to be as of January 1, 1940. The information given should, where necessary, cover a sufficient period prior to such date to give a clear and fair picture of the nature and extent of the business of applicant which properly should be covered by the certificate or permit sought. Wherever changes in the nature or extent of the operation have been made since January 1, 1940, they should be clearly indicated.

DESCRIPTION OF TRANSPORTATION SERVICE, ROUTES, PORTS SERVED REGULARLY AND IRREGULARLY, AND OTHER PERTINENT INFORMATION

I. DESCRIPTION OF TRANSPORTATION SERVICE:

A. Applicant (or predecessor in interest) was engaged in the business of transporting, in interstate or foreign commerce:

(1) ☒ Commodities generally.

(2) ☐ Commodities generally, except _____ (Indicate exceptions, either specifically or by their general nature)

(3) ☐ Special commodities _____ (Indicate specifically commodities transported).

(4) ☐ Passengers.

B. Applicant (or predecessor in interest) undertook to transport passengers or property for the general public for hire. No (Yes or No). If answer is "No", state for whom applicant (or predecessor in interest) transported since January 1, 1940, or prior thereto, under special contracts or agreements:

Name	Address (Street, City and State)	Written or Verbal Contract or Agreement and Date Thereof
(1) Christie Scow Corp.	70 Pine Street, N.Y., N.Y.	Verbal
(2) The Hutton Company	Kingston, N.Y.	Written
(3) McLain Marine Corp.	17 Battery Place, N.Y.	N.Y. Verbal
(4) Republic Steel Corp.	Cleveland, Ohio	Written
(5) Wright & Cobb. Ltge Co.	17 Battery Place, N.Y.,	N.Y. Written
(6) M & J. Tracy, Inc.	1 Broadway, N.Y.,	N.Y. Verbal

and others

Commodity Covered	Volume Agreed to be Transported	Duration of Contract or Agreement
(1a) Crushed stone and other commodities	Any amount	Season of 1941
(2a) Brick	" "	"
(3a) Any commodity (Erie Canal)	" "	"

(If any of the same contract referred to on lines (1), (2), (3), etc.)

C. Applicant (or predecessor in interest) has continued to operate as above stated without any change in the transportation service as described above and is now so operating. Yes (Yes or No) If answer is "No", state in detail character and extent of such change in service._____

_____

_____

D. If the changes indicated in the answer to (C) above represent interruptions of transportation service since January 1, 1940, caused by conditions over which applicant (or predecessor in interest) had no control, give facts and reasons clearly and in detail._____

_____

_____

E. Applicant (or predecessor in interest) is engaged in furnishing seasonal transportation only. No (Yes or No) If the answer is "Yes", state the limits of the seasonal operation, naming month of commencement and month of cessation.

_____

If the above seasonal period does not include January 1, 1940, was applicant (or predecessor in interest) rendering above service during the seasonal period ending prior to that date? _____ (Yes or No) Was applicant (or predecessor in interest) providing same service during seasonal period subsequent to January 1, 1940? _____ (Yes or No) Outline fully any changes in character and extent of service between seasonal operation including, or prior to, January 1, 1940, and subsequent seasonal operation: _____

_____

_____

_____

II. DESCRIPTION OF ROUTES:

A. Regular Routes:

Ports or points to or from which applicant (or predecessor in interest) regularly operated as of January 1, 1940, or prior thereto, and number of revenue calls at each between January 1, 1940, and date of application:

B. Irregular Routes:

Ports or points to or from which applicant (or predecessor in interest) offered occisional but irregular service as of January 1, 1940, or prior thereto, and number of

Usually applicant's towing services are suspended in the Hudson River on account of ice from approximately December to March. Its services are rendered 12 months in the waters of New York Harbor and the waters adjacent to New York City. Applicant furnishes towage services to and from and between Waterford, N.Y., and New York City, N.Y., and the Harbor of New York and the waters about New York City and all intermediate points.

C. Has applicant (or predecessor in interest) acquired by purchase or otherwise a route or routes since January 1, 1940? No (Yes or No) If so, attach statement, properly designated, giving, for each such route, the information requested in A and B above, also name and address of predecessor. Attach copy of purchase agreement, or other documents, evidencing the acquisition of each such route or routes.

D. Does applicant apply for rights over any route or routes operated by others under agreement? No (Yes or No) If so, attach statement, properly designated, giving, for each route, the information requested in A and B above, also name and address of operator. Attach copy of charter, operating contract, or other agreement.

E. Does applicant apply for rights over any route or routes over which it operates ships owned by others under charter, contract, or other agreement? No (Yes or No) If so, attach statement, properly designated, giving, for each such route, the information requested in A and B above, also name and address of the other party to such charter, contract, or agreement. Attach copy of such charter, contract, or agreement.

F. Has applicant (or predecessor in interest) abandoned or disposed of by sale or otherwise any route or routes since January 1, 1940? No (Yes or No) If so, attach statement, properly designated, giving, for each such route, the information requested in A and B above, the manner and date of disposition, and name and address of successor, if any. Attach copy of the sales agreement or other documents evidencing such disposal.

G. Were operations on any of the above routes or parts of such routes covered by answer to questions C, D, E, or F seasonal? None (Yes or No) If so, attach statement, properly designated, giving facts clearly and in detail, showing applicant's customary operation (or that of predecessor in interest), including months of normal operating season.

H. If applicant (or predecessor in interest) is subject to Part III of the Interstate Commerce Act in transportation of passengers or property in interstate or foreign commerce only by reason of participation in through routes and joint rates, name carriers with whom such traffic was interchanged as of January 1, 1940, or prior thereto, and interchange points: None

State clearly any changes since January 1, 1940:
None

III. DESCRIPTION OF EQUIPMENT:

A. Total number of vessels in commission and operated by applicant (or predecessor in interest) as a common or contract carrier on January 1, 1940, including vessels owned, chartered, or leased from others. 5 tugboats
(1) Number of owned vessels operated by applicant (or predecessor in interest) 5 tugboats
(2) Number of vessels under charter to applicant (or predecessor in interest) None
(Answers to (1) and (2) should total answer to (A))

B. Number of vessels owned by applicant (or predecessor in interest) and under charter to others on January 1, 1940.
None

C. Total number of vessels in commission and operated by applicant (or predecessor in interest) as a common or contract carrier on date of this application, including vessels owned, chartered, or leased from others 10 tugboats
(1) Number of owned vessels operated by applicant (or predecessor in interest) 10 tugboats
(2) Number of vessels under charter to applicant (or predecessor in interest) None
(Answers to (1) and (2) should total answer to (C))

D. Number of vessels owned by applicant (or predecessor in interest) and under charter to others on date of this application. None

IV. DUAL OPERATIONS:

A. Is applicant (or predecessor in interest) controlled by a person who has filed or intends to file a separate application for a certificate as a common carrier by water or a permit as a contract carrier by water? No (Yes or No) If answer is "Yes", state name and address of such person, and whether such person is applying for a common carrier certificate or contract carrier permit.

Was applicant (or predecessor in interest) so controlled on January 1, 1940? No (Yes or No)

B. Does applicant (or predecessor in interest) control a person who has filed or intends to file a separate application for a certificate as a common carrier by water or a permit as a contract carrier by water? No (Yes or No) If

answer is "Yes", state name and address of such person, and whether such person is applying for a common carrier certificate or contract carrier permit. _____

Did applicant (or predecessor in interest) control such person on January 1, 1940? No (Yes or No)

C. Is applicant (or predecessor in interest) under common control with a person who has filed or intends to file a separate application for a certificate as a common carrier by water or a permit as a contract carrier by water? No (Yes or No) If answer is "Yes", state name and address of such person, and whether such person is applying for a common carrier certificate or contract carrier permit.

Was applicant (or predecessor in interest) under such common control on January 1, 1940? No (Yes or No)

V. EVIDENCE OF OPERATION:

A. Applicant submits the following evidence as proof of its operations (or those of predecessor in interest) as of January 1, 1940:

Affidavit of Harry H. Flemming annexed hereto.

(Applicant should list above the documents it is attaching in the form of affidavits, bills of lading, schedules, or other documents which it believes sufficiently prove the maintenance of service as stated.)

B. Applicant submits the following evidence as proof of its operations (or those of predecessor in interest) on the date of this application:

Affidavit of Harry H. Flemming annexed hereto.

(Applicant should list above the documents it is attaching in the form of affidavits, bills of lading, schedules, or other documents which it believes sufficiently prove the maintenance of service as stated.)

The foregoing answers in this Exhibit A are made by the applicant without prejudice to its contention that in its performance of towage services for hire it is not a carrier and does not carry or transport any property or passengers, and that it is not subject to the Act.

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"SCHEDULE I"

Card Towing Line,Inc.	17 Battery Place,N.Y.,N.Y.
Moran Towing & Transportation Co.Inc.,	17 Battery Place, N.Y.,N.Y
Russell Bros. Towing Company,Inc.	51 Madison Avenue,N.Y.,N.Y.
W.E.Hedger Transportation Corporation	120 Wall Street, N.Y., N.Y.
O'Donnell Transportation Company, Inc.	44 Whitehall Street, N.Y.,N.Y.
McLain Marine Corporation,	17 Battery Place, N.Y.,N.Y.
Murray Transportation Company	17 State Street, N.Y., N.Y.

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STATE OF NEW YORK :
ss
COUNTY OF ULSTER :

HARRY H. FLEMMING, being duly sworn, says:

I am Secretary of Cornell Steamboat Company, and have held that position for upwards of 28 years. The said Cornell Steamboat Company is a corporation under the laws of the State of New York, with a principal office for the transaction of business at No. 22 Ferry Street, Kingston, N.Y.

I know of my own knowledge that Cornell Steamboat Company on January 1st, 1940 and previously thereto was engaged in the furnishing of towage services for hire to and from and between Waterford, N.Y., and New York City, N.Y., and the Harbor of New York and the waters about New York City.

I also know of my own knowledge that at all times since January 1st, 1940, Cornell Steamboat Company has been and still is engaged in the said business hereinabove stated.

Sworn to before me
this 10th day of May, 1941

Notary Public, Ulster County,
N. Y.

Received from:
KIRLIN, CAMPBELL, HICKOX, KEATING & GRAHAM
120 Broadway New York
One piece of ordinary mail addressed
to His Excellency the Governor of New York State
Executive Office
Albany New York
THIS RECEIPT DOES NOT PROVIDE FOR INDEMNIFICATION
POSTMASTER.

Received from:
KIRLIN, CAMPBELL, HICKOX, KEATING & GRAHAM
120 Broadway New York
One piece of ordinary mail addressed
to His Excellency the Governor of the State of New Jersey
Executive Office
Trenton New Jersey
THIS RECEIPT DOES NOT PROVIDE FOR INDEMNIFICATION
POSTMASTER.

Form 3817
Rev. 9-37
Post Office Department
Received from:
Cornell Steamboat Company
22 Ferry St. Kingston, N.Y.
One piece of ordinary mail addressed
to Murray Transportation Co. Inc.
17 Battery Place
New York City
THIS RECEIPT DOES NOT PROVIDE FOR INDEMNIFICATION
POSTMASTER.

Form 3817
Rev. 9-37
Post Office Department
Received from:
Cornell Steamboat Co.
22 Ferry St. Kingston, N.Y.
One piece of ordinary mail addressed
to Clark Towing Corp.
17 Battery Place
New York City
THIS RECEIPT DOES NOT PROVIDE FOR INDEMNIFICATION
POSTMASTER.

Form 3817
Rev. 9-37
Post Office Department
Received from:
Cornell Steamboat Co.
22 Ferry St. Kingston, N.Y.
One piece of ordinary mail addressed
to Cornell Steamboat Towing Co. Inc.
51 Madison Ave
New York City
THIS RECEIPT DOES NOT PROVIDE FOR INDEMNIFICATION
POSTMASTER.

Form 3817
Rev. 9-37
Post Office Department
Received from:
Cornell Steamboat Co.
22 Ferry St. Kingston, N.Y.
One piece of ordinary mail addressed
to Murray Transportation Company
17 State St.
New York City
THIS RECEIPT DOES NOT PROVIDE FOR INDEMNIFICATION
POSTMASTER.

Form 3817
Rev. 9-37
Post Office Department
Received from:
Cornell Steamboat Company
22 Ferry St. Kingston, N.Y.
One piece of ordinary mail addressed
to N.E. Heger Transportation Corp.
120 Wall St.
New York City
THIS RECEIPT DOES NOT PROVIDE FOR INDEMNIFICATION
POSTMASTER.

Form 3817
Rev. 9-37
Post Office Department
Received from:
Cornell Steamboat Co.
22 Ferry St. Kingston, N.Y.
One piece of ordinary mail addressed
to O'Donnell Transportation Co. Inc.
44 Whitehall St.
New York City
THIS RECEIPT DOES NOT PROVIDE FOR INDEMNIFICATION
POSTMASTER.

Form 3817
Rev. 9-37
Post Office Department
Received from:
Cornell Steamboat Co.
22 Ferry St. Kingston, N.Y.
One piece of ordinary mail addressed
to McAllen Marine Corporation
17 Battery Place
New York City
THIS RECEIPT DOES NOT PROVIDE FOR INDEMNIFICATION
POSTMASTER.

[fols. 107-116] Petition to dismiss application omitted. Printed side page 16 ante.

[fols.117-118] BEFORE THE INTERSTATE COMMERCE COMMISSION

W-359

In the Matter of The Petition of Cornell Steamboat Company to dismiss its application for a permit under Section 309 (f) of Part III of the Interstate Commerce Act.

Statement of Evidence

Hotel St. George, Brooklyn, N. Y., Friday, October 3, 1941, 10 a. m. E. S. T.

(Met pursuant to notice.)

Before: Examiner Wilkins.

APPEARANCES:

Robert S. Erskine, Esq., appearing for Cornell Steamboat Co., Applicant, 120 Broadway, New York, N. Y.

Stanley Carpenter, Esq., 143 Liberty Street, New York, N. Y., appearing for Rail Carriers in Official Classification Territory, Protestants.

Reginald G. Narelle, 24 Stone Street, New York, N. Y., appearing for Northeastern Inland Waterways Association, Inc., Intervenor.

[fol. 119] PROCEEDINGS

Exam. Wilkins: The Interstate Commerce Commission has assigned for hearing at this time and place Docket W-359, Application by Cornell Steamboat Company, for a permit as a contract carrier by water.

As the Examiner understands it, this applicant has also filed a petition for dismissal of this application, which will be included as a part of the record under which the hearing today is to be held.

Who appears for the applicant?

Mr. Erskine: Robert S. Erskine, 120 Broadway, New York City. I am admitted to practice before the Commission.

Exam. Wilkins: Are there any appearances for intervenors in support of or in opposition to the application?

(No response.)

Exam. Wilkins: Apparently there are no other appearances. The applicant may proceed.

Mr. Erskine: May I ask that Mr. Coykendall be sworn as a witness?

FREDERICK COYKENDALL, was sworn, and testified as follows:

Direct examination.

By Mr. Erskine:

Q. Mr. Coykendall, are you president of Cornell Steamboat Company?

[fol. 120] A. I am.

Q. And approximately how long have you held that position?

A. 29 years.

Q. In what state is Cornell Boat Company incorporated?

A. New York.

Q. Is the Cornell Steamboat Company—the present corporation—an offshoot, so to speak, of other previous companies or concerns?

A. The corporation was started in 1878 as a continuation of a business started by my grandfather in 1837.

Q. During all of that time down to date, who has owned Cornell Steamboat Company and its predecessors?

A. The same family—my grandfather and his son-in-law and his family.

Q. And the corporation is still owned in the family today?

A. Completely.

Q. In a general way, what type of vessel does Cornell Steamboat Company own and operate?

A. Towboats only.

Q. Some of them are steam tugs, and some Diesel engines?

A. Some are steamers, some are Diesels.

Q. Does Cornell Steamboat Company carry, or has it ever carried, on those tugboats, any freights or cargoes of merchandise for hire?

A. None whatever.

[fol. 121] Q. Or passengers?

A. No.

Q. Does Cornell Steamboat Company own or operate any other type of vessel than those tugboats?

A. None, except in connection with its repair equipment —we own a scow, too.

Q. Does Cornell Steamboat Company own or operate any barges or lighters or similar type of carrying craft?

A. None whatever.

Q. What services does Cornell Steamboat Company render through the tugboats?

A. Towing services—anywhere on the Hudson River and in New York Harbor.

Q. Are those the limits of the waters on which you render those services?

A. Yes.

Q. When you say the Hudson River, what are the termini?

A. Troy—we occasionally go to Waterford—Waterford is as far as we ever go.

Q. That is above Troy?

A. Between the Troy lock and the entrance to the Erie Canal—that part of the Hudson River.

Q. In connection with the towing on the Hudson River as far north as Waterford, are you able to operate 12 months of the year?

[fol. 122] A. No.

Q. Why?

A. Ice forms somewhere around the first part of December, and we open again about March 15th.

Q. That is with respect to the upper part of the river?

A. All the way down—in fact, all the way to New York.

Q. Is there any set date at which you terminate or begin the services on that part of the river?

A. No. Whenever the ice lets us, we start; and whenever it stops, we close.

Q. Now, with respect to any towing services in the Harbor of New York, what waters do you refer to or have in mind?

A. All the limits of New York Harbor.

Q. East River——

A. East River, North River, Staten Island.

Q. Do you do any towing services beyond or through Hell Gate and into the Sound?

A. No. Let's see—we go as far as Flushing occasionally.

Q. You do not go outside the Narrows, on the ocean?

A. No—not the Narrows or down the Sound.

Q. On what basis of arrangements or agreements are your towing services rendered?

A. Most of it is done by personal agreements with customers.

Q. Can you explain that a little more in detail?

[fol. 123] A. The largest part of our business is done on time contracts entered into for a period of years. Then we have other arrangements that run for a single year. Then we have a small amount of what I might call miscellaneous business, quoted from day to day.

Q. In connection with those miscellaneous jobs, on what basis are they done? How is the arrangement made?

A. A man calls up and wants to know what it will cost to take a boat from such a place to such a place. We give him the price to take it.

Q. In each instance, then, whenever you tow, it is done on an agreement with respect to that job, whether over a season or for the individual job?

A. Exactly. It may be that some of these men give us two or three jobs a year, and they know what the previous prices were, and they rely on that to be the price at the next job.

Q. In a general way, these individuals or companies who contract for your services operate what kind of vessels?

A. Scows and deep boats, as we call them—carrying the cargo in the hold.

Q. The scows carry cargoes on deck?

A. That is right.

Q. And the deep boats carry the cargoes under deck?

A. That is right.

[fol. 124] Exam. Wilkins: Could a deep boat be considered a barge?

The Witness: It is a barge; that is another name for the same thing.

By Mr. Erskine:

Q. Are there types of boats sometimes known as canal boats? Do you tow them on the river?

A. Canal boats now are practically no different from deep boats. The canal boat is a small-sized deep boat. In the old days, canal boats were about 250 tons, but now they run to 600 or more.

Q. And those vessels carry cargo, do they?

A. Yes.

Q. In your arrangements for towing services, and in making the contracts that you describe, with whom do you deal?

A. The owner of the boat.

Q. Do you have any dealings or any agreement of any sort with the owner's shippers or consignees of any cargoes on those boats?

A. No—well, except where the cargo is owned by the same man as owns the boat.

Q. But in dealing with him, does the cargo enter into your dealings at all?

A. Except as to its size—that is all.

Q. Does Cornell Steamboat Company have anything to do in connection with any agreement as to the amount of [fol. 125] freight or other charges paid by the owners or shippers of cargo to the owner of the barge or scow which carries it?

A. Nothing to do, and no knowledge of it.

Q. In making your contracts for towage services, does your charge in any way relate or have any connection with any freight moneys paid by the owner of the cargoes to the owner of the barges or scows?

A. Not at all.

Q. Against whom does your bill lie for the towage services rendered?

A. The owner of the barge.

Q. When you submit a bill, does it name the boats which have been towed?

A. Yes.

Q. And is there any notation put on the bill as to any lien or security for your services?

A. The barges are liable for the towing—the individual barges.

Q. Subject to a lien, a maritime lien?

A. Yes—unless we have notice beforehand that the operator of the barge does not own it.

Q. If he does not own the barge, what conditions are you referring to?

A. We are relying on his credit. Where a man charters a barge owned by another man, we rely on the charterer's [fol. 126] credit rather than the credit of the barge.

Q. You spoke once before about the fact that your contracts and agreements were made with the owners of these barges and scows. Do you mean also to include the charterers who operate them?

A. Yes. An owner may charter a few extra scows, and we include those in his contract.

Q. Does Cornell Steamboat Company advertise in any daily papers or trade journals, holding out any offer of towing services?

A. No. I think we have one slip in the Bullinger's Guide. We have had that for many years; it simply announces towing services.

Q. Does Cornell Steamboat Company, in any public notice such as you have mentioned, quote any towing rates or any offer?

A. No.

Q. Does Cornell Steamboat Company have anything to do with any arrangements between the owners or shippers of the cargoes and the owners or charterers of the barges and scows, as to where or how the cargo is to be moved?

A. We have no arrangement with anybody except the owner of the barge or his representative, who tells us where the barge is to go.

Q. When the owner or charterer of the scows or barges [fol. 127] is negotiating with the shipper or owner of the cargoes as to the terms of carriage and where it is to be carried, you have nothing to do with that?

A. We don't hear of it until after.

Q. You have no knowledge of it?

A. No knowledge of it.

Q. In connection with any of the towage services rendered by Cornell Steamboat Company, does your company issue any bill of lading or similar document with respect to the cargoes on the boats towed?

A. None at all.

Q. When your tugboats furnish these towage services to the barges or scows, how do the tugs make fast—in a general way—to the boat?

A. It depends on the number of boats to be towed at one time.

Q. What I mean is this: The tug, in a general way, puts out lines?

A. Yes.

Q. And furnishes the power to move those boats from point to point?

A. That is right.

Q. While Cornell's tugs are rendering those services, do the captains or any other men on your tugboats have anything to do with the cargoes on the boats in the tow?

[fol. 128] A. Not at all.

Q. Do those boats in the tow have any captains or crews on them?

A. Each has its own captain.

Q. Is that captain in any way in Cornell Steamboat Company's employ?

A. Not at all.

Q. In arriving at the rates or charges for which Cornell contracts to furnish its various towage services, have you any interest in, or any connection with, the rates of freight paid by the cargoes to the owners of the barges or scows?

A. None at all. We have no knowledge of it, in fact.

(Discussion off the record.)

Mr. Carpenter: May I at this time enter my appearance?

Exam. Wilkins: In this case, the case of the Cornell Steamboat Company?

Mr. Carpenter: Yes.

Exam. Wilkins: Are you for the applicant?

Mr. Carpenter: No, we represent protestants.

Exam. Wilkins: An intervener in opposition?

Mr. Carpenter: Yes.

Exam. Wilkins: Who is the intervenor?

Mr. Carpenter: Rail Carriers in Official Classification [fol. 129] Territory.

Exam. Wilkins: Will you give your name?

Mr. Carpenter: Stanley Carpenter, 143 Liberty Street, New York City, representing the Rail Carriers in Official Classification Territory. I am a practitioner before the Interstate Commerce Commission.

Mr. Narelle: Reginald G. Narelle, 24 Stone Street, New York City, President of Northeastern Inland Waterways Association. I am admitted to practice before the Commission.

Exam. Wilkins: You are an intervenor?

Mr. Narelle: Yes, sir.

Exam. Wilkins: Taking what position?

Mr. Narelle: More or less as amicus curiae. I don't know whether we will be opposing the applicant until we see what the record develops.

Exam. Wilkins: Very well.

By Mr. Erskine:

Q. Does Cornell Steamboat Company invariably perform towage services for any person or company that requests them?

A. No, not always.

Q. Are there times when you decline the request?

A. There are.

Q. Can you indicate in a general way some of the reasons for declining?

[fol. 130] A. There might be various reasons. One might be unsatisfactory credit experience. One might be the condition of the property to be towed. Another might be whether we can do it without injuring our other customers —our regular customers—because they come first.

Q. Are there occasions, or have there been occasions, when Cornell Steamboat Company refuses to perform those services requested unless the owner of the barge or the scow to be towed gives you a release from all liability, including negligence?

A. That frequently happens.

Q. Now, you described your towing services as rendered on the Hudson River and in the Harbor of New York. I assume that that means that the services may be between different points on those waters?

A. Anywhere.

Q. And how are those points determined? Under the instructions of the owner or charterer of the barge or scow?

A. Exactly.

Q. When your tugs tow the boat to the place designated, have you anything further to do with the boat or any cargo on board of her?

A. After she has landed, we are through.

Q. Do you have any interest—or, in many cases, do you [fol. 131] have any knowledge—of the fact as to where the boat or the cargo on board of her may be going after you finish your towing service?

A. We have none at any time.

Q. In the same way, do you know, or do you lack knowledge of, where the boat or the cargo may have come from in some cases when you undertake to tow them on the river?

A. The boat has to come from the place we pick it up at. The cargo——

Q. When you pick it up somewhere on the river, are there occasions when you may not know where it has previously come from, or its cargo?

A. If the boat is out of the canal, we wouldn't know.

Q. When you finish the towing service which you undertake to perform by landing the boat at destination, does Cornell Steamboat Co. have anything to do with any further arrangements to move the boat anywhere else?

A. After our job is done, that is all.

Q. In every instance when you undertake to furnish towage services, as you have described them, do you know what cargo is on the barge or scow to be towed?

A. Sometimes—and sometimes not. Very frequently, not.

Q. Will you tell me whether the bulk of the towage services you have described is furnished by the tugs of Cornell Steamboat Company between points in the state of New [fol. 132] York or outside the state of New York?

A. 95 per cent of it goes between points in the state of New York—over 95 per cent.

Q. The other percentage goes where outside of New York?

A. To New Jersey. That is within the limits of New York Harbor.

Q. In other words, there are some cases of boats which you tow under the arrangements described, which come down the river from a point in New York and are delivered in New Jersey, in the area of New York Harbor?

A. Exactly.

Q. I think you said something awhile back about quantity of cargo in connection with your towing rate. Will you describe how the quantity of cargo enters into the towing rate in any way?

A. The price of the barge is based upon her size and the cargo she carries.

Q. And why does the size of the barge enter into the towing rate?

A. That regulates her cargo—the size of the barge regulates her cargo.

Q. In performing the towage service, how does the size of the barge affect the towing charges? I mean, whether it is a 500-ton barge or a thousand ton barge.

A. The larger the unit, the smaller the rate.

[fol. 133] Q. And it is in that way that the size of the boat and the quantity of cargo which it can carry enters into your arrangement as to the rate?

A. Yes.

Q. But, outside of that, you have no interest in the cargo or the freight money?

A. None at all. For instance, a 2,000-ton barge per ton would be less than a 200-ton barge per ton.

Q. Is Cornell Steamboat Company self-insured with respect to the towage services which it renders?

A. Yes.

Q. During the time that you have been president of the corporation, Cornell Steamboat Company has had numerous litigated matters which have gone to decision in the Federal Courts?

A. Yes—many.

Q. Can you tell us whether in any one of those cases, Cornell Steamboat Company or its tugs have ever been held to any liability as a carrier?

A. No—none.

Q. It has or has not?

A. It has not.

Q. In the petition filed by Cornell Steamboat Company in this matter, there is a statement in paragraph 6 that says: "Cornell owns a fleet of upwards of 33 tugboats of varying [fol. 134] size and power." Is that statement correct?

A. Right now, yes.

Q. And are they all in operation at one time, as a rule?

A. No—very seldom all at one time.

Exam. Wilkins: In order that the record may be clear on that, you are referring to paragraph 6 of the affidavit attached to the petition? Is that right?

Mr. Erskine: That is what I meant.

Exam. Wilkins: I note that there are paragraphs numbered in the petition itself, as well.

Mr. Erskine: That is so.

By Mr. Erskine:

Q. Have there been occasions in connection with the towing services you have described as rendered in past years, when, on the faliure of the owner of the boat or barge, you have been compelled to commence proceedings to collect your towing charges?

A. Often.

Q. The proceedings have been brought against the barge or scow or other vessel itself?

A. Yes.

Q. For enforcement of a maritime lien?

A. That is right.

Q. Those enforcements of liens have always been against the barges or boats?

A. Yes.

[fol. 135] Q. Have they ever, that you know of, been against the cargoes?

A. No.

Q. Do you have any knowledge of or any connection with, or do you take any part in, any arrangements between the owners or shippers of cargoes and any other persons, regarding through movements or through rates?

A. None whatever.

Q. The charges which you agree on with your customers for the towage services have no relation or connection with any through rate involved between the cargo and other parties?

A. None whatever.

Q. When you spoke a few minutes ago of 95 per cent. of your towage services being between points in the state of New York, was that statement based on a recent careful check of your records?

A. A check of the year 1940, yes.

Q. To your knowledge, was 1940 a fairly representative year?

A. Exactly. That is, representative of the last 10 years, I would say.

Q. You spoke of certain services rendered by Cornell's tugs to companies or individuals who own or operate the

scows or barges on which they carry their own merchandise? [fol. 136] Is that correct?

A. Yes.

Q. Is that a part of the total services that you render, or is it the bulk, or a big majority?

A. It is the bulk of it. It is probably over 70 per cent., I should say.

Q. In those cases, does Cornell Steamboat Company have any interest whatsoever in the actual commodities which are shipped by those customers?

A. No.

Q. Are your towing charges in those cases in any way connected with, or do they reflect in any way, any sales price of the commodities themselves?

A. We have no knowledge of that.

Q. So far as Cornell Steamboat Company is concerned, are the arrangements or the general basis of arrangements any different for such an individual company shipping its own commodities, but also owning and operating the boat, and the arrangements you would make with any other owner or operator of a boat? In other words, when you deal with those customers, do you deal with them as shippers of the cargo or as owner-operators of the boat?

A. Solely as owner-operators of the boat.

Q. And, aside from any arrangement in rates, depending on the volume or nature of the business, your dealings with [fol. 137] them are on the same basis as the dealings with any other owners or operators of boats?

A. The same.

Q. The mere fact that they are shipping their own merchandise in no way enters into your services or contracts?

A. We don't care where the merchandise comes from.

Q. Are some of your contracts which you described—particularly those over a period of time—entered into in writing?

A. The bulk of them, yes.

Q. Then are there others that are oral, made over the telephone or in person?

A. None would be made over the telephone. We have one or two oral contracts.

Q. Made in person?

A. Yes—made in person with the owner.

Mr. Erskine: Unless the Examiner wishes some further information, I think that will cover what we have in mind.

Exam. Wilkins: The Examiner would like to know whether you can present a copy of one of these contracts that you make which might be representative.

The Witness: I could. I can't now but I could.

Exam. Wilkins: Have you any objection to doing that?

The Witness: No.

Mr. Carpenter: Mr. Examiner, may I suggest that you [fol. 138] ask for a representative contract over this period?

Exam. Wilkins: Well, I asked for a contract which would be representative.

The Witness: Of what is going on now?

Exam. Wilkins: Yes. And I assume that that is the same as what you were doing just prior to January 1, 1940. Or is it?

The Witness: They have been the same for quite a number of years.

Mr. Erskine: May I ask a question there, as I would in any Court proceeding? I am sure that Mr. Coykendall has no objection to disclosing the terms of all these contracts—that is, the provisions and conditions—but if you required to disclose publicly now such rates as he may make with these customers, which is a business matter.

Exam. Wilkins: Well, all the Examiner wanted was a form filled in with "John Doe" or fictitious figures to indicate what is representative of the undertaking and the basis for your operation.

The Witness: I can give you that, yes.

Exam. Wilkins: Can that be furnished today, before the Examiner leaves?

The Witness: What time are you going to leave? It is a question of running up to the office and getting it.

Exam. Wilkins: I have another case after this one closes. [fol. 139] I expect to be here until 7 o'clock tonight, anyway.

The Witness: I think we can get it to you.

(Discussion off the record.)

Exam. Wilkins: There should be at least two copies, exactly alike. And these other parties probably would want a copy.

The Witness: Take a contract and just substitute "John Doe" and then go on with the rest of the contract, and leave out the specific price, for instance, on a specific boat?

Exam. Wilkins: That is right—or whatever basis for the price you have.

Mr. Erskine: It would be a little easier, I think, if we could mail that to you. Could we mail it to you?

Exam. Wilkins: I would rather have it in the record today, if we can. We are not supposed to give an exhibit number unless we actually put it in the record.

Mr. Erskine: It will take an hour to go from here to the office.

The Witness: We will telephone it up now and have it written up. That should not take half an hour, I think; they are not long.

Exam. Wilkins: If you will do that, I would be glad to have it.

There are one or two other questions I should like to [fol. 140] ask. Do you ever charter one of these tugs to some other person who operates?

The Witness: We have, in previous years. We haven't done it, I guess, for 5 or 6 years. We wouldn't now, anyway.

Exam. Wilkins: You would not perform that sort of a service today?

The Witness: That is not a part of our business. We have heretofore, as I say, but we haven't done it recently.

Exam. Wilkins: You said that the price for your services had nothing to do with the cargo, but you had some statement with respect to the capacity of the barge or scow. Wouldn't it have something to do with how much weight the cargo was?

The Witness: It is the weight of the cargo.

Exam. Wilkins: And not whether it actually occupied the entire space?

The Witness: That is just exactly the point. We base our rate on the weight of the cargo on the barge, and the size of the barge determines how much weight she can carry, and we estimate our own cargo by seeing the freeboard on the boat. We know how much she has got on.

Exam. Wilkins: In other words, if the cargo consisted of sand or gravel or steel, they wouldn't have as much in as they would with a lighter commodity—but it would be [fol. 141] determined by the weight?

The Witness: The weight—how deep down the boat is down in the water. We know that.

Exam. Wilkins: Is there any cross examination of this witness?

Mr. Carpenter: May I interject something for just a moment? Do you intend that the parties of record will be furnished with copies of that contract to which you have just referred?

Exam. Wilkins: Yes, I have asked them to bring enough copies for the parties here.

Mr. Erskine: How many will that mean?

Exam. Wilkins: How many of you want copies?

Mr. Carpenter: I want one.

Mr. Narelle: So do I.

Exam. Wilkins: That will be four all together—two for the record, and two for the parties.

Mr. Erskine: May I ask another question on the record?

Exam. Wilkins: Yes.

By Mr. Erskine:

Q. On the last question that the Examiner put to you about the weight of the cargo, am I right or wrong in saying that the weight of the cargo is of interest to you simply because of the weight in the boat that is being towed?

A. Right.

Q. And does it make any difference to you what kind of [fol. 142] cargo it is, or whose cargo it is?

A. No, we don't care whose cargo it is. It is the depth of the boat in the water that we are after.

Q. I neglected to put in the record the routine question as to the home address of the Cornell Steamboat Company, the principal office.

A. Kingston, New York.

Q. And do you have an office at New York City?

A. Yes, we operate offices here.

Q. Where is that?

A. Foot of West 53rd Street.

Mr. Erskine: That is all.

Exam. Wilkins: Is there cross-examination?

Cross-examination.

By Mr. Carpenter:

Q. Mr. Coykendall, how long has Cornell Steamboat Company been in business?

A. Well, as I say, it was incorporated in 1878, as a continuation of a business started by my grandfather in 1837.

Q. Cornell Steamboat Company has been instrumental in developing considerable business on the Hudson, hasn't it?

A. I wouldn't think so. I don't think it has developed any business except its own.

Q. Its services have attracted traffic, too, haven't they?

A. I wouldn't say that. I don't think our services have [fol. 143] attracted anybody. It has been there, and we have supplied the need after it came.

Q. When you stated that 95 per cent of your business is destined to points within the limits of New York Harbor——

A. I said it was delivered to points——

Q. Delivered. Did you mean New York Harbor as described in ex parte 140?

A. I don't know what that is. It is whatever the limits of New York Harbor are in the I. C. C. determination.

Q. That is right. That includes points into Jersey?

A. Yes, that's right.

Mr. Erskine: Are you speaking of the 95 per cent. or the 5 per cent?

Mr. Carpenter: I am speaking of the 95 per cent.

The Witness: The 95 per cent. did not include the New Jersey points. Last year, 4.4 per cent. went to points in New Jersey. All the rest went to points in New York State.

By Mr. Carpenter:

Q. Within the range of your operation, with credit considerations being favorable, contents of the barges being what you think they should be, will you tow for anyone seeking your services?

A. We are likely to, yes.

Q. Do you tow any vessels for other operators or individuals on a percentage basis?

[fol. 144] A. No.

Q. You chose the year 1940, I understand, as being a representative year?

A. Of the last 10 years, I said.

Q. Of the last 10 years?

A. Yes.

Q. 1940 was representative of traffic for——

Mr. Erskine: May I suggest that you be clear about that? Mr. Coykendall was talking of the percentage of the movements intrastate and interstate. He said it was representative of that phase of the matter.

Mr. Carpenter: That is correct. That is what I am asking about.

By Mr. Carpenter:

Q. That was representative?

A. That was representative.

Mr. Carpenter: That is all.

Exam. Wilkins: Is there any further cross examination?

Mr. Narelle: Yes.

By Mr. Narelle:

Q. Your risks are not predicated in relation to the cargo itself?

A. Not at all. You mean, what the cargo is?

Q. The type of cargo.

A. No, it is not.

Q. Do you ever tow for the Buffalo Barge Towing Co.?

[fol. 145] A. I do now, yes.

Q. Do you tow on a percentage basis?

A. No.

Q. Did you ever?

A. No, never did.

Q. Never did?

A. No.

Q. This Bullinger's Guide that you speak of——

A. I had better change that a little bit. At one time, we had a base rate, and if the Buffalo Barge Company owned above a certain rate, we were to get a certain amount above that service, but that disappeared ten years ago.

Q. You have not performed that service in the last ten years?

A. No.

Q. Towing vessels where the owners of the vessels own the cargo—you perform that sort of service?

A. Oh, yes. In fact, most of our business is that kind of business.

Q. Most of your business?

A. Yes.

Q. And you do not know whether that cargo is in interstate commerce in its movements, or not?

A. We have no knowledge of where the cargo is going at all.

Q. You make no attempts to investigate whether it is in interstate commerce or not?

A. We know in a general way, but we have no official knowledge. We know that it is mostly New York State stuff.

Q. Are there any other companies towing on the Hudson River that give comparable service to your Hudson River towing?

[fol. 146] A. I wouldn't like to say that. That is for other people to say.

Mr. Erskine: I think that that question might be subject to a non-legal objection. It is a pretty broad question—what is meant by "comparable."

Exam. Wilkins: The Commission would like to know what your competition is.

The Witness: I think that we are the best towers on the Hudson River. We have competition of all kinds.

Exam. Wilkins: Does that answer your question, Mr. Narelle?

Mr. Narelle: Yes, we will concede that.

By Mr. Narelle:

Q. You have regular schedules of towing—flotilla towing—on the Hudson?

A. We try to satisfy a man's needs every day. We arrange, if a man wants a boat towed—we try to tow him the same — he gives us the order.

Q. But do you not have certain set days of the week in which you have tows leaving New York, on the one hand, and Albany, on the other?

A. Right.

Q. More or less set schedules?

A. Yes.

Q. And ordinarily a concern offering you towing services would have to wait perhaps a day sometimes to put their [fol. 147] barge in that particular tow?

A. That depends on whether they would want to wait for that tow or come down by themselves.

Q. If they want to come down by themselves, your towing service would be considerably higher?

A. Yes—higher than if they came with a lot of other boats.

Q. In the regular flotilla towing, your rates, based on the tonnage, are the same for each customer?

A. Right.

Q. And are there any other towing services on the Hudson River giving such flotilla towing schedules?

A. Well, let's see—practically all the canal operators run up and down with flotilla tows.

Q. Is it not a fact that the canal operators are towing their own vessels with their own power units?

A. And frequently some of ours, too.

Mr. Narelle: What I am trying to develop, Mr. Examiner, is the service on the Hudson River and the competition of the Cornell Steamboat Company.

Exam. Wilkins: The Commission would like to know, with respect to what this service is, whether it is in the nature of a common carrier service or whether it is in the nature of a contract carrier service. The answers that the witness gave to some of your questions would indicate that he maintains regular schedules on certain days of the week [fol. 148] between certain ports for general tow, and that those customers who can include their barges or scows in those tows get a different rate than those who ask for individual service at a particular time. The Examiner wants to get all the facts to determine whether there is any distinction between those services.

The Witness: There is. The customer who asks us to do work at our convenience and in our method gets one rate. If a man wants a single tug for a single barge, he gets an entirely different rate, and he makes an entirely different time. In other words, it is a different type of service.

Exam. Wilkins: Your application is for a permit as a contract carrier—that is, in case the Commission determines you have to have some authority—as distinguished from a common carrier. The Commission would also like to know the number of shippers that you serve, and what limitations you have on that service. In other words, just how is that limited so that you are a contract carrier, rather than a common carrier?

The Witness: As I said, about 70 per cent. of our business, I think, is done on regular contracts, and we agree in the contract to give a specific type of service to the customer.

Exam. Wilkins: How do you get these customers?

[fol. 149] The Witness: We know who they are. Of course, having been there since 1837, we pretty much know every manufacturer on the river. We go to him and ask him for a contract and show him what kind of service we can give him, and he gives us the contract.

Exam. Wilkins: Do some of them come to you?

The Witness: They may have in the early days, but they have been our customers for so long that the method of coming to us has almost been forgotten.

Exam. Wilkins: And you don't actually hold yourselves out to the general public?

The Witness: No, no.

Exam. Wilkins: You don't hold yourselves out to conduct towing services?

The Witness: We don't hold ourselves out at all. As a rule, we do take orders, as I mentioned. I think that 12 or 13 per cent. of our business is miscellaneous business. People will call up today and say that they want us to take a barge from here to there. We ask what kind of barge it is and how much it carries, and we give them a price, and we do that job. The rest is all by yearly or regular arrangements with customers, even down to the naming of the barge that they want towed.

Exam. Wilkins: On these operations where you have a tow leaving on certain days of the week from certain ports——

[fol. 150] The Witness: One every night from New York, we'll say.

Exam. Wilkins: (Continuing) —how do you determine the limits of the number of barges or scows that you will include in that tow?

The Witness: We practically have no limits; we take all that will come. One night, we may have 50 barges; the next night, we may have 5.

Exam. Wilkins: But when you say "all that will come," are those to come only from your individual——

The Witness: Individual customers or people who have made arrangements with us.

Exam. Wilkins: Ahead of time?

The Witness: Exactly.

Exam. Wilkins: It all must be arranged in advance?

The Witness: We must have the order for the barge before the barges leave the stake boat, as we call it.

Exam. Wilkins: You also indicated that you must know that the credit of the customer is good?

The Witness: We have some on the blacklist, whom we do not tow, because we know that they don't pay.

Exam. Wilkins: Are there any further questions of this witness?

Mr. Narelle: Yes.

By Mr. Narelle:

Q. On that question of the schedules, Mr. Coykendall, and [fol. 151] your statement that there is no limit——

A. To the number of boats in the tow.

Q. (Continuing) —to the number of boats in the tow, you also stated that arrangements must be made ahead of time. When you say that, do you mean ahead of the time of the scheduled leaving of the fleet?

A. That's right—ahead of that.

Q. But if there is some boat owner who may not have a yearly contract with you—and provided that the vessel and the cargo and the credit arrangement are satisfactory—you will tow his boat in that fleet?

A. Surely—if he gives us an order for it before the tow starts.

Mr. Narelle: Mr. Examiner, I want to make this statement for the record: We do not challenge the position of the applicant here, so far as his territorial rights are concerned. We are interested in developing all of the facts for the record here, to get a good record in these cases. For instance, as an example, if this applicant here should be held to be a common carrier, it is quite conceivable that he might be subject to regulation and not even have the exemption under 303-B, by reason of the amendment to the Intercoastal Act of 1933. For instance, if he is held to be a common carrier operating on the high seas from port to [fol. 152] port, in those instances where he is towing the barges for individuals who own the cargo, he would be subject to the regulations and would have to file his rates.

Exam. Wilkins: What is it that you are doing now? Are you arguing the point of law, or are you giving a basis for some questions?

Mr. Narelle: A basis for questions—to develop facts.

Mr. Erskine: May I interrupt? The witness has testified that they do not do any towing—any operations—on the high seas.

Exam. Wilkins: That is what the Examiner understood the witness to say—that they do not operate on the high seas at all.

Mr. Narelle: It is purely a question of what the high seas are.

The Witness: New York Harbor is not the high seas.

Exam. Wilkins: That is a matter for argument. He stated where he operated.

Mr. Narelle: I want to bring that fact out for the benefit of counsel for the applicant—that it might be raised.

Exam. Wilkins: Very well. Are there any further questions?

Mr. Erskine: May I ask a question?

Exam. Wilkins: If this gentleman is through.

[fol. 153] Mr. Narelle: I think we have covered all the points.

Exam. Wilkins: The Examiner would like to ask, in connection with that matter of the tows at regular sailing schedules, how much of the business which your company conducts is of that nature?

The Witness: Well, I should say 85 or 90 per cent. of it. It is nearly all that kind of stuff. We take an order today for a barge going, we will say, to Poughkeepsie; we put it in with other barges leaving here tonight, some going to Poughkeepsie, some going to Tarrytown, some going to Newburgh; and we execute that man's order tonight. We execute the order on the first night after we get it. We are supposed to leave here every night, as far as Poughkeepsie; and every other night, as far as Albany. That is the present schedule.

Exam. Wilkins: The regular schedule that you have?

The Witness: The present schedule.

Exam. Wilkins: How do you acquaint your customers with that fact, that you have that schedule?

The Witness: They just know it—just by habit—that's all. That is the custom.

Exam. Wilkins: Do you send them any circular at the beginning of the year, or anything like that?

The Witness: No. The business has been going on for so long that everybody knows it.

[fol. 154] Exam. Wilkins: The Examiner is just trying to get all the facts, to figure out whether there is any common carrier service in this, or whether it is strictly a contract carrier service.

The Witness: As I say, the type of service is specified in the contract that we make with the man; and after that, we have to live up to that.

Exam. Wilkins: You indicate that you may leave some of these barges or scows at one point on the route?

The Witness: Oh, yes—drop them off.

Exam. Wilkins: And others at other points?

The Witness: Yes.

Exam. Wilkins: Do you have any arrangements with any other operator towing, as to transferring a barge or a scow to a tow operated by some other operator——

The Witness: No, none at all.

Exam. Wilkins: When you speak of having tows leaving certain ports on certain days for certain destinations, do you operate over a particular route between those ports?

The Witness: Just the Hudson River—That's all. We come down the channel of the Hudson River between Albany and New York.

Exam. Wilkins: Is there anything further from this witness?

Mr. Erskine: I should like to try to add a little to this [fol. 155] description of the scheduled tows.

By Mr. Erskine:

Q. You speak of the towing of these tows every night, for instance, in fleets. I assume that the underlying fact is that, if you can tow a group of boats with two, three or four tugs, you can quote a lower rate than if you had to put a single tug on each boat towed? Is that right?

A. Exactly.

Q. That is understood and explained to your customers when you make the contract?

A. They all know that.

Q. Do you maintain a regularity of schedule whenever there is no business for those tugs of yours? In other

words, if there are no fleets of boats to go up the river, do you send your tugs up?

A. As a practical matter, we do, because we have to have them at the other end. There is nothing else for them to do, so we send them along, whether we have 5 or 50 boats in the tow.

Q. Is there a time in the season when you shorten or do not maintain——

A. In the fall of the year, yes.

Q. You do not send those tows out and try to maintain a schedule of sending them on an exact hour?

A. No, no; it may not get out until tomorrow morning [fol. 156] sometimes, or 9 o'clock tonight. The basis of the thing is the wording of the contract with the customer. In one of our contracts, we say that we agree to maintain a service nightly between New York and such a point, and that determines our obligation. As long as that obligation is in the contract, we have to do it.

Exam. Wilkins: Does that indicate to the Examiner, then, that the basis for this regularity is to take care of service of particular customers?

The Witness: Exactly. That is just what it is.

Exam. Wilkins: It is not, then, primarily a regular schedule to serve the general public?

The Witness: Not at all. It is based on——

Exam. Wilkins: But to take care of the particular customers who have traffic to these points?

The Witness: Exactly. And if, some night, the regular customer had all that we could handle and the other fellow did not, he would have to wait; the regular customer would go. Our obligation is to the contract made with the individual customer.

By Mr. Erskine:

Q. When you spoke of taking all the boats that were there to be towed, is it a fact that you can handle the varying numbers of the boats in a fleet by adding more or less tugs of varying power?

A. Oh, yes.

[fol. 157] Mr. Erskine: I think that is all.

Exam. Wilkins: Is there anything further from this witness?

By Mr. Narelle:

Q. For the record, Mr. Coykendall, the question of this time factor is determined more or less by the tide, isn't it?

A. Oh, yes.

Q. You said maybe 9 o'clock—or perhaps it was 2 o'clock. It is the tidal factors that really govern your leaving?

A. You try to get out of New York on the first of your flood tide.

Q. Do you tow for any concerns who have no specific contracts?

A. Not many large ones, no.

Q. I mean, many individuals.

A. A few, yes.

Q. Boat owners?

A. I would say that probably 12 or 13 per cent. of our business is not under contract.

Exam. Wilkins: You mean, not under written contract?

The Witness: Not under some arrangement or other. Over 60 per cent. is under written contract.

Mr. Erskine: Are you referring to a season contract?

The Witness: A season contract.

Mr. Erskine: But do you tow for anybody without having [fol. 158] an agreement with him before you tow the boat?

The Witness: No, that is an individual one-day arrangement. He gets a price this afternoon to take a boat from here to some other place. That is not a contract. That is just miscellaneous business.

Exam. Wilkins: The Examiner understood you to say that you make no agreements or contracts over the telephone; that, if it was oral, it had to be between the party and yourself.

The Witness: That is for season or term contracts. But you could call up today for 10 o'clock and ask the price for a barge from here to Newburgh. We would tell you, and that would be the end of it. It would not be any contract.

Exam. Wilkins: And that might be a person who did not have a season contract with you?

The Witness: Yes, it would be a person without a season contract. The other person has the provision in his contract. This just applies to the miscellaneous business that is not under contract—and that is a very small part.

Exam. Wilkins: Then you do operate a part of your business in connection with customers who are not under any written contract?

The Witness: Oh, yes—but, as I say, perhaps 12 per [fol. 159] cent. of it——

Mr. Erskine: Do you tow for any other than your regular season customers without having a definite agreement as to the particular price and terms for the particular job you are rendering?

The Witness: No, that is quite right. That is an agreement for that job.

Exam. Wilkins: But could it be entered into over the telephone?

The Witness: It could, yes.

Exam. Wilkins: Then would you enter into such an agreement with anybody that you had not had previous dealings with?

The Witness: We would want to know something about them. If it was out of the blue, we would want to know who he was, and what he had to go, before we would give him a price.

Exam. Wilkins: And what his responsibility was?

The Witness: Exactly.

Exam. Wilkins: You would make all those inquiries?

The Witness: Oh, yes.

Mr. Erskine: And on occasions of those types, have you in the past refused the towing?

The Witness: Yes, yes.

Exam. Wilkins: Do you require a pre-payment?

[fol. 160] The Witness: No—well, we might if the fellow was good in every respect except his credit. Then we might say, "Pay us in advance, and we will take it." We have done that.

Exam. Wilkins: Is there anything further from this witness?

Mr. Narelle: Yes.

By Mr. Narelle:

Q. Mr. Coykendall, on these so-called seasonal contracts under which you guaranteee to perform this towing service as to schedules and as to rates, is there any obligation on the part of that boat owner to guarantee you a minimum amount of business per annum?

A. No—that is just for whatever business he may have.

Q. I see. Well, then, you would not consider that type of contract a bilateral contract?

A. Just what——

Q. Where there are obligations on both sides—for you to perform, and for him to guarantee you a minimum amount of towing per annum.

A. No minimum. He might, for instance, name his barges in the contract, and we are to have the towing of these barges if they run. If they don't, we don't get any towing.

Q. In other words, you would not consider that type of contract a bilateral contract?

A. No, I would not.

[fol. 161] Mr. Narelle: That is all.

Exam. Wilkins: This exhibit—a copy of a representative contract—will be marked Exhibit No. 1 and received in evidence.

(Applicant's Exhibit 1, Witness Coykendall, received in evidence.)

Exam. Wilkins: If there is nothing further, the witness is excused.

(Witness excused.)

(Discussion off the record.)

Mr. Erskine: I rest.

Exam. Wilkins: The Examiner understands that this is all that is to be presented in favor of the applicant. Will there be some witnesses on behalf of intervenors? I understand that one intervenor is in opposition, and one has not as yet stated his position. Do you have any witnesses that you want to present for this hearing before this matter is closed?

Mr. Narelle: No. What is the procedure here, Mr. Examiner, on the question of filing briefs.

Exam. Wilkins: That is what the Examiner is coming to now, if there are no further witnesses.

Mr. Narelle: No further witnesses.

Exam. Wilkins: Do the parties desire to file briefs?

Mr. Erskine: Yes.

[fol. 162] Exam. Wilkins: Then I will fix the date for filing of briefs as November 3; that is 30 days from now. If there is nothing further, the hearing is closed.

(Whereupon the hearing was closed at 11 o'clock a. m.)

[fol. 163] APPLICANT'S EXHIBIT E, WITNESS COYKENDALL

Agreement, made this — day of ——, between Blank Company of (Place), party of the first part, and the Cornell Steamboat Company, a corporation of New York, party of the second part.

Witnesseth, That for the considerations and conditions hereinafter contained, and for the sum of One ($1.00) dollar, each to the other paid, the receipt of which is hereby acknowledged, the parties hereto agree as follows:

1. The party of the first part agrees to employ the party of the second part, to tow all barges, scows or other vessels which are engaged in carrying brick from the docks of the party of the first part situated at (Place) to destinations on the Hudson River and in New York Harbor, and to pay for such service at the charges named herein.

2. The party of the second part, during the term of this contract, or any extension thereof, as herein provided, agrees to maintain and conduct a regular towing service to all points on the Hudson River and in New York Harbor, during the season of open navigation in each year, and to tow barges to destinations ordered by the party of the first part, at the charges named therein.

3. The charges for round trip towing between (Place) [fol. 164] and the terminal at 52nd Street, North River, or such other terminal north of 52nd Street, as may be used shall be fixed charges per barge based upon —— per M, upon the full capacity of the barge figured to the next even $5.00 and based upon the new size of Hudson River brick as generally manufactured at the present time, which charge shall cover towing of the barge without cargo from the terminal stakeboat of the party of the second part at New York to the dock of the party of the first part at (Place), and return of the barge with cargo to a terminal at New York. To intermediate points on the Hudson River, the charge shall not be greater than made by the party of the second part to any other brick customer for like service. The destinations covered by the preceding shall be docks on the main channel of the Hudson River only. To docks not on the main channel, where creek or high water towing is required, the customary extra charges of the party of the second part shall be paid by the party of the first part. It is understood that the towing charges named herein are

based upon towing the barges in accordance with the practice of the party of the second part in fleet tows with other barges and that the party of the second part is not liable for wharfage or other charges which may be made against [fol. 165] any barge at the New York Terminal or any destination.

4. The barges now owned by the party of the first part are agreed to be of the capacities stated in the following schedule and shall be charged at the fixed prices named for towing from (Place) to New York and return:

Barge	Capacity	Price
A 1	370 M	—
A 2	350 M	—

Barges will be considered to carry full loads unless the cargoes are ten (10%) per cent or more below capacity in which case an allowance will be made.

5. For delivery from the terminal at 52nd Street, North River to points in New York Harbor, the charges shall be according to the following schedule. If it is necessary to use another terminal north of 52nd Street, North River, then the charges for Harbor delivery may be readjusted accordingly provided that in any case where the party of the second part shall be entitled to make readjusted charges, or to receive additional compensation, as in the paragraph provided, such charges or compensation shall be at no higher rate than charged to any other person or corporation, by the party of the second part, for brick barge towing.

(Schedule)

6. In any event, and particularly with respect to any round trip towage of the barges, scows or other vessels referred to herein, the party of the second part shall not be [fol. 166] deemed to have the said barges, scows or other vessels in its custody and shall not be under any responsibility to the same while the said barges, scows or other vessels are lying at any dock or terminal, and are not actually being towed by the tugs of the party of the second part.

7. This contract is to take effect on the — day of —— and is to continue in force until the — day of ——. The contract shall further continue in force after —— unless

before —— either party shall specify in writing its desire to terminate the contract and if such notice be given then the contract shall terminate on the ——, but if such notice be not given, then the contract shall continue from year to year and thereafter may not be terminated except upon twelve months written notice by either party.

8. Bills are to be rendered monthly and are to be paid by the party of the first part on or before the twentieth day of the month following that in which the work is done.

9. Towing of barges owned or chartered by the party of the first part and loaded with material other than brick, or other towing of barges owned or chartered by the party of the first part, not covered by the schedules named herein, shall be included in this contract and paid for by the party [fol. 167] of the first part at the current charges of the party of the second part to other customers for similar service.

10. If, during the life of this contract, the party of the second part shall make any general reduction in its charges to other brick customers for similar service, then the charges named herein shall be reduced so as not to be in excess of similar charges to others.

11. If, during the life of this contract, due to strikes or other causes beyond the control of the party of the second part, the cost of fuel or labor shall be increased to the party of the second part, then the charges named herein may be increased, providing such increase is effective as to all other parties for whom the party of the second part shall render similar service for barges.

12. This contract shall be binding upon both parties, their successors or their assigns.

In testimony whereof, the parties hereto have set their hands this — day of ——, in the year ——.

—— ——.

[fols. 168-178] Proposed report omitted. Printed side page 23 ante.

[fol. 179] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. W-359

PETITION of CORNELL STEAMBOAT COMPANY for an Order Dismissing Its Application for a Permit under Section 309(f) of the Transportation Act of 1940.

EXCEPTIONS OF CORNELL STEAMBOAT COMPANY TO PROPOSED REPORT, BRIEF IN SUPPORT OF EXCEPTIONS (BY REFERENCE TO THE PRINTED BRIEF HERETOFORE FILED HEREIN), AND REQUEST FOR ORAL ARGUMENT—Filed February 2, 1942

I

Exceptions

Your petitioner, Cornell Steamboat Company, respectfully excepts to the report proposed herein by Andrew C. Wilkins, Examiner, in the following respects:

1. The undisputed facts found by the Examiner in his proposed report (Sheets 1-6) establish that both in fact and in law your petitioner engages solely in the business of furnishing towage services for hire, does not carry nor contract to carry any merchandise or passengers, and does not engage in the business of a contract carrier. That appears more particularly from the following findings of the Examiner:

> [fol. 180] "• • • but applicant does not own or operate any barges or lighters or similar type of *carrying craft.* No cargoes of merchandise for hire or passengers are carried on any of the towboats, and they are used exclusively in towing for applicant's customers, over 70 per cent of whom are shippers who own or operate the scows or barges used *in carrying their own merchandise.* Other customers *are water carriers.*" (Italics ours. Report, Sheets 2-3.)
>
> "The only interest applicant has in a cargo is its weight and the size of the scow or barge on which it is loaded. The rate charged for towing is lower for the larger units." (Report, Sheet 3.)
>
> "Applicant does not issue any bill of lading or similar document with respect to the cargoes on the scows or barges towed. Each scow or barge has its own

captain who looks after the safety of the vessel and its cargo. Neither the captain of the towboat nor any other employee of applicant has anything to do with the cargoes on the vessels in the tow. Applicant generally has no interest in or knowledge of the origin or final destination of the cargoes. * * *" (Sheet 4.)

Those are plain findings that your petitioner does not enter into any contract for the carriage of merchandise or passengers, does not in fact carry any, and that the carriage is actually performed by petitioner's customers who own or operate the scows and barges on which the merchandise is carried. Therefore, the proposed report errs in recommending the conclusion that your petitioner is a contract carrier by water, and was such on January 1st, 1940. (Report, Sheets 8-9.)

2. The proposed report erroneously ignores the fact that the words "carriage" and "transportation" are synon- [fol. 181] ymous, both in their plain and every-day usage, and in their usage by Congress in the provisions of the Transportation Act of 1940 (Report, Sheets 8-10). By reason thereof, the report ignores the plain intent of Congress to regulate only carriers within the plain and common meaning of the word,—*i.e.*, those who engage in the business of carrying merchandise or passengers under the contractual obligations of carriers. On the facts found by the Examiner, your petitioner does not come within that category.

3. In spite of the proofs that your petitioner is not a carrier, the proposed report recommends that it be held to be a contract carrier by reason of the definitions of "transportation facility" and "transportation", as set forth in Section 302(g) and (h), as applied to the towing services of the petitioner and the use of its tugboats (Report, Sheet 8). That recommendation is not supported by any reasonable interpretation of the provisions of Part III of the Act, which indicate plainly that Congress intended to regulate only those persons who are engaged in the business of carriers, within the ordinary meaning of the word. Section 302(e) provides as follows:

"(e) The term 'contract carrier by water' means any person which, under individual contracts, or agree-

ments, engages in the transportation * * * by water, of passengers or property in interstate or foreign commerce for compensation."

Therefore, the subsequent definitions in Section 302(g) and (h) must have been intended by Congress to relate to services and equipment furnished or used *by persons who are in fact carriers.* Those are the only persons with whom Congress was concerned. It is an improper distortion of the plain meaning of the provisions of the Act as a whole to [fol. 182] suggest that Congress in the definitions contained in Sections 302(g) and (h) inten-ed by legislative fiat to make any party a carrier who in actual fact is not a carrier.

4. The recommendation that the Commission should find that your petitioner is entitled to a permit as a contract carrier under the provisions of Section 309(f)(g) and that such a permit should be issued, (Report, Sheets 8-10), is in violation of the plain language of those provisions which do not confer any such authority upon the Commission. Section 309(f)(g) expressly provides that the only person required to hold such a permit *and the only person to whom the Commission has authority to issue* such a permit is one who "shall engage in the business of a contract carrier by water." On the undisputed facts found by the Examiner your petitioner does not come within that category.

5. The proposed report is in error in recommending that the Commission should conclude that the provisions of Section 303(f)(2) were not intended by Congress to indicate that persons who are not carriers and who merely furnish towage services for hire are not subject to the provisions of Part III of the said act. (Report, Sheet 8.)

6. The proposed report is in error in recommending a conclusion that the towage services rendered by your petitioner to carriers are transportation services (Report, Sheet 8). Such a recommendation ignores the synonymous character of the words "transportation" and "carrriage", and ignores the undisputed fact that the actual carriage is performed by the owners or operators of the scows and barges, and not by your petitioner. Congress plainly intended the Act to apply only to carriers.

[fol. 183] 7. The proposed report errs in recommending that the Commission find that towage services rendered by

the petitioner intra-state are not incidental to the interstate carriage of merchandise by the carriers themselves (Report, Sheets 8-9.)

8. The proposed report errs in recommending that the Commission find that towage services performed by your petitioner for carriers from or to points outside the limits of New York Harbor are not incidental to the transportation performed by the carriers themselves, and are not exempt from the Act under the provisions of Section 303(f)(2) (Report, Sheets 8-9.)

9. The proposed report errs in failing to recommend to the Commission the conclusions that your petitioner is not a carrier, is not engaged in the business of a contract carrier by water, and is not subject to Part III of the Transportation Act of 1940, and that the Commission is not authorized to require that your petitioner hold, or to issue to your petitioner, a permit under Section 309(f).

10. The proposed report errs in failing to recommend that the Commission grant the petition herein and dismiss the application for a permit on the ground that your petitioner is not subject to the Act.

II

Brief in Support of Exceptions

Your petitioner respectfully requests that the printed brief which it filed with the Commisison in this matter on November 4th, 1941, be received and considered by the Commission as its brief in support of the foregoing exceptions.

[fol. 184]

III

Request for Oral Argument

Your petitioner respectfully requests that an oral argument of the questions involved herein be granted. The questions are of importance not only to your petitioner but also to all other parties who, like your petitioner, merely furnish towage services for hire, and do not carry any merchandise or passengers, and are not carriers by water. So far as your petitioner is aware, these questions have not yet received the final consideration and determination of the

Commission, in its interpretation of the provisions of Part III of the Transportation Act of 1940. Oral argument has the possibility of contributing effectively to an intelligent determination of those questions, and your petitioner believes that the importance of the matter requires that oral argument should be granted.

January 31st, 1942.

Respectfully submitted, Robert S. Erskine, Attorney for Cornell Steamboat Company, Office and P. O. Address, 120 Broadway, Borough of Manhattan, City of New York.

[fol. 185] CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing exceptions and request for oral argument upon all parties of record by mailing a copy thereof, properly addressed, to each party; and also that the brief for the petitioner, submitted herein by reference, was heretofore served upon all parties of record on November 1st, 1941.

Dated New York, N. Y., January 31st, 1942.

(Signed) Robert S. Erskine.

[fols. 186-200] Opinion, certificate and order omitted. Printed side page 32 ante.

[fol. 201] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. W-359

In the Matter of the Application of CORNELL STEAMBOAT COMPANY for a Permit as a Contract Carrier by Water

PETITION FOR REARGUMENT AND REHEARING—Filed July 8, 1942

Now Comes Cornell Steamboat Company and respectfully petitions that the Commission will grant a reargument and rehearing of the report and order filed and entered herein by Division 4 of the Commission on June 15th, 1942; that the said reargument and rehearing may be before the full Commission; and that the Commission will stay the afore-

said order of Division 4 pending the final determination of the said reargument and rehearing.

[fol. 202] STATEMENT

Cornell Steamboat Company, (hereinafter referred to as Petitioner), a New York corporation, is engaged solely in the business of performing towage services under contract. As more fully appears from the facts found and set forth in the report of Division 4 herein, Petitioner does not carry any passengers or merchandise upon its tugboats, which are used exclusively in performing contract towing services for its customers on the Hudson River between Waterford, N. Y., and New York City, and in the waters adjacent to New York City. Petitioner's customers are owners or operators of barges and scows, or similar vessels, on which the said customers are, themselves, the carriers of merchandise and cargoes. Petitioner has no contractual relationship with the cargoes which are carried by its customers, issues no bills of lading or other similar documents, has no interest whatsoever in the said cargoes or their freight moneys, and, under the heretofore established law, is under no liability except for negligent towage.

Petitioner, under the Transportation Act of 1940, filed [fol. 203] with the Commission an application for a permit as a contract carrier, without prejudice to its contention that it is not in fact or in law a carrier, and, therefore, is not subject to Part III of the said Act. Contemporaneously, Petitioner filed its petition for a dismissal of its application upon the aforesaid grounds. That procedure was adopted in accordance with a suggestion of the Director of the Bureau of Water Carriers, in order to determine the question of the application of the Act to an independent contract tower such as Petitioner.

Division 4, in its report and order filed and entered by it on June 15th, 1942, has now held that, under the provisions of Part III of the Transportation Act of 1940, Petitioner is engaged in the business of a common carrier, has issued a certificate to it as such, has denied the petition to dismiss the application for a permit, and has ordered that Petitioner perform its contract towage services as a certificated common carrier from and after July 24th, 1942.

Petitioner respectfully submits that there is error in the report and order of Division 4 in the following respects, [fol. 204] among others:

Exceptions

1. The undisputed facts, as found by Division 4, establish that Petitioner is not a carrier and that it does not engage in the business of a carrier by the performances of its contracts for towage services under the legal and common and legislative meaning of the word "carrier", as heretofore established by the courts of the United States.

2. There is no language in the Transportation Act of 1940, Part III, to indicate that Congress used the words "carrier" or "the business of a carrier" in any other than their common meaning, as used in earlier legislation relating to water carriers, and as established by the courts of the United States. It is well-settled that an independent contract tower and its business do not come within the common meaning of those words.

[fol. 205] 3. Division 4 has erred by inferring that Congress intended to regulate the use of vessels *per se*. The wording of the Act shows the plain intent of Congress to regulate only *persons engaged in the business of carriers*. It is elementary that such a business involves a contractual relationship between the carrier and the merchandise carried. There is no such relationship in the business of an independent contract tower. In fact, Petitioner has no part or voice in the contracts of carriage entered into between the owners of the barges and scows and the owners of the cargoes.

4. Under the established law of the land, including the judicial interpretation of the word "carrier" as used in earlier legislation relating to water carriers, an independent tower performing services such as those of Petitioner is not a carrier either in fact or in law. Therefore, if Division 4, (on sheet 7 of its report), intended to find that under § 320 (d) there is no conflict between the aforesaid law and the provisions of the Act, Division 4 has erred in concluding that the Act was intended to convert an independent [fol. 206] tower into a common carrier. Conversely, the present holding by Division 4, that under the Act Petitioner is engaging in the business of a common carrier, would involve a direct conflict between the provisions of the Act and the previously existing law, and would assume an intent of Congress (not indicated in the Act itself), to

make a revolutionary change in the law applicable to the status and business of an independent tower.

5. By reason of the matters set forth in the preceding paragraph, Division 4 has erred in its conclusion that Petitioner can at the same time be held to be engaging in the business of a common carrier under the Act, and yet be under none of the legal liabilities of such a common carrier, because of § 320(d).

6. Even if Petitioner is engaged in business as a carrier (which Petitioner disputes), Division 4 has erred in holding that Petitioner has held itself out as a common carrier. The undisputed facts show that Petitioner has held itself [fol. 207] out only to tow for those persons with whom it may be willing to contract and only upon terms and conditions quite different from those of a common carrier. The facts that Petitioner has performed its contract services for many years, is widely known, and has a large list of customers, do not constitute a "holding out" as a common carrier.

7. Division 4 has erred in finding that the towage operations of Petitioner on the Federal waterway of the Hudson River between Waterford, N. Y., and New York City are interstate in character, merely because its tows may cross the imaginary boundary line of the State of New Jersey at some point in the Hudson River. *People Ex Rel. Cornell v. Sohmer* (1914) 235 U. S. 549, 560-561. Division 4 erred in failing to find that such towage services are intra-state in fact and in law.

8. Division 4 has apparently been influenced in its conclusions by its belief that independent towers, like Petitioner, must be subjected to regulation in order to carry out the broad purposes of the Act. (*Report*, Sheets 8-9). There is no sound basis for any such Conclusion. Congress [fol. 208] plainly provided that the purposes of the Act be achieved through the regulation of the carriers themselves, —i. e., the owners and operators of the barges and scows, who undertake to carry, and actually carry the merchandise. To those carriers, the towage charges of an independent tower, such as Petitioner, are merely an incidental operating expense, just as are the items of wharfage, insurance, wages, repairs, etc. The purposes of the Act can be completely achieved by the regulation of the said carriers, and

there is, therefore, no reason to assume that Congress intended the Commission to make a revolutionary change in the law applicable to the status and business of independent towers in order to regulate the carriers.

9. Division 4, on the established facts and law, has erred in its refusal to dismiss Petitioner's application for a permit on the ground that Petitioner is not engaged in business as a carrier, and therefore is not subject to the Act.

10. Alternatively, if Petitioner be held to engage in the business of a carrer (which Petitioner disputes), Division 4 [fol. 209] has erred in failing to find that Petitioner has only the status of a contract carrier, and should receive a permit to continue its operations as such.

Reasons for Granting the Reargument and Rehearing

Petitioner, and other independent towers, of which there are many, are vitally and seriously affected by the revolutionary change in their status and legal liability which would result under the report and other of Division 4.

Such independent towers have been engaged in the business of contract towing for many years under a status of legal liability which has been well defined by the courts. They have developed their extensive business of contract towing in the knowledge that, under well-settled law, they are not common carriers, and are not "carriers" of any sort, but are liable only in *tort* to the boats in their tows or to the cargoes on those boats, for the consequences of negligence in the performance of their towage services. On [fol. 210] such basis, they have been under none of the liabilities of a common carrier, and have been free to enter into contracts of towage upon special terms and conditions, (such as freedom from liability for negligence,) which would not be available to a common carrier. As contract towers they have been free to base their towing charges upon the circumstances and conditions peculiar to the towage services to be rendered under any individual contract. They have been under no contractual obligations to the cargoes loaded upon the barges and scows owned and operated by the carriers themselves, (Petitioner's customers), and have not been obligated in law to issue any bills of lading or similar documents to the said cargoes. They have been under no responsibilities or liabilities beyond the proper performance of their towage serv-

ices between the points of starting and ending the towage services, irrespective of any prior or subsequent movements of the barges and scows and their cargoes by other sources.

It is at once apparent that if such independent towers as Petitioner are now held and certificated to be engaged in [fol. 211] the business of common carriers, the effect upon the status and business of such towers will be revolutionary. They will come before the courts as persons engaged in the business of common carriers, presumably with all the liabilities of common carriers; and the rights and immunities which they have heretofore had as towers will be completely nullified.

Petitioner submits, therefore, that the questions involved in this proceeding are of such paramount importance that they should receive the most careful consideration and final determination of the Commission.

Conclusion

Accordingly, Petitioner respectfully prays:

1. That the Commission will grant this petition and will direct that there be had, before the full Commission, a reargument and rehearing of the report and order filed and entered herein by Division 4 on June 15th, 1942;

[fol. 212] 2. That the Commission will stay the aforesaid order of Division 4, pending the final determination of the said reargument and rehearing.

3. That the Commission, after rehearing and reargument, and after such further consideration of the matter as it may deem proper, will be pleased to reverse the aforesaid report and order of Division 4, and will direct the dismissal of your Petitioner's application for a permit on the ground that it is not a carrier and is not subject to the terms of Part III of the Transportation Act of 1940;

4. Alternatively, that the Commission, if it finds that Petitioner is a carrier, (which Petitioner disputes,) will modify the aforesaid report and order of Division 4 by finding that Petitioner is only a contract carrier, and will direct the issuance of a permit to it to operate as such;

5. That the Commission will be pleased to find and direct that Petitioner's performance of towage services upon the

Hudson River between points in New York State and New [fol. 213] York City are not of such interstate character as to bring them under the regulations of the aforesaid Act of 1940.

6. That the Commission will grant such other and further relief to Petitioner as may seem just in the premises.

Respectfully submitted, Cornell Steamboat Company By (Signed) Robert S. Erskine, Attorney for Petitioner Office & P. O. Address 120 Broadway, Borough of Manhattan City of New York.

Dated New York, the 7th day of July, 1942.

Certificate of Service

I hereby certify that I have this day served the foregoing petition upon all the parties in this proceeding by mailing a copy thereof to each of the said parties.

(Signed) Robert S. Erskine, Attorney for Petitioner.

Dated, New York, the 7th day of July, 1942.

[fols. 214-224] Report on reargument omitted. Printed side page 56, ante.

[fol. 225] In United States District Court

Cornell Steamboat Company, Plaintiff,

v.

United States of America, Defendant

Opinion—Filed July 9, 1943

Before Frank, Circuit Judge, and Coxe and Bright, District Judges

Kirlin, Campbell, Hickox, Keating & McGrann, (Robert S. Erskine, of Counsel), for plaintiff,

Robert L. Pierce, Special Assistant to the Attorney General, for the United States,

E. M. Reidy, Assistant Chief Counsel, for the Interstate Commerce Commission,

Tom C. Clark, Assistant Attorney General (Daniel W. Knowlton, of counsel) for defendant,

Foley & Martin (James A. Martin and Christopher E. Heckman, of counsel) for National Water Carriers Association, Inc., Intervenors,

Bingham, Dana & Gould (Boston, Mass.) for Boston Tow Boat Company, Intervenors.

Suit by plaintiff against the Interstate Commerce Commission, complaining of an order entered by the Commission pursuant to Part III of the Interstate Commerce Act. Dismissed.

The plaintiff, Cornell Steamboat Company, a New York corporation, filed an application with the Interstate Commerce Commission for a permit as a "contract carrier by water" under Part III of the Interstate Commerce Act, to continue its operation under the so-called "grandfather" clause of that Act as a "contract carrier"; that clause [fol. 226] (§309) provides for the issuance, without proof that the public convenience and necessity will be served thereby, of a certificate to a carrier engaged in bona fide operations on January 1, 1940 and continually since then, either as a "contract carrier" or a "common carrier." In the alternative, plaintiff asked that its application be considered one for the appropriate form of authority. In its application plaintiff also stated that it was filing the same without prejudice to its contention that it was not a carrier and that it was not subject to the jurisdiction of the Commission; at the same time, plaintiff filed with the Commission a petition to dismiss its application on the same grounds. Evidence was taken before a Commission Examiner who made a proposed report to the effect that plaintiff was a "grandfather" contract carrier. Exceptions to this report were argued before Division 4 of the Commission which held that the plaintiff was "a common carrier by water," entitled to a "grandfather" certificate as such and that such a certificate should issue. On plaintiff's motion, the matter was re-argued before the full Commission which, with a slight modification,[1] affirmed the opinion and findings of Division 4 and entered an order accordingly.

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[1] The modification, pursuant to §303(g), provided that no certificate was required for towage performed by plaintiff wholly within New York Harbor, since plaintiff is not, as to such towage, a party to any arrangement for the through carriage of the barges towed or their cargoes to points outside New York State.

The evidence before the Commission showed the following: The plaintiff for many years before and on January 1, 1940, and continuously since then, owned tugboats which it used to furnish towage services for hire on the Hudson River between Waterford, New York, and New York City, New York, and upon the waters of New York Harbor or the waters surrounding New York City.[1a] At the time of [fol. 227] the hearing, plaintiff owned thirty-three tugs. It furnishes its services to barges, scows and similar vessels which themselves usually carry cargoes. Plaintiff does not carry any freight or passengers on its tugs. The tugs merely attach their towing lines to the vessels to be towed and move them to points of destination as directed by the owners or operators of those vessels. Each of those vessels thus towed has its own captain on board; plaintiff's employees have nothing to do with the carrying of any cargo on those vessels. Plaintiff issues no bills of lading or similar documents for any such cargoes, and has no arrangement with anybody except the owners or operators of such vessels.[1b] Over 70% of plaintiff's customers are shippers

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[1a] Plaintiff was incorporated in 1878 to continue the towing business started in 1837 by the grandfather of its president who has held that position for the past 29 years. From its inception, the business of plaintiff has been, and still is, owned by succeeding generations of the same family.

[1b] It has no direct or indirect interest in, and often has no knowledge of, the character of those cargoes, or of the origin or final destination thereof. Its responsibilities begin when the vessel is taken in tow and ends when the tow is left at the agreed destination. It has nothing to do with the contractual arrangements between the barge-owners and the cargo-owners as to any forwarding or delivery of the cargo. It takes no part in, and has no interest whatever in, and no knowledge of, the arrangements between the owners of the cargoes and the barge-owners either with respect to freight-rates or with respect to any other terms of their contract to carry. Plaintiff's charges are agreed on in its contracts with the owners or operators of the towed vessels, are not dependent in any way upon the freight monies between those vessels and their cargoes, are direct charges against the barge-owners under its contracts with them, and are secured by maritime liens against

who own or operate towed barges used in carrying their own merchandise. The largest part of its business is done on time contracts entered into for a period of years; some contracts run for a single year; from 12% to 13% of its business is done under miscellaneous contracts arranged from day to day. Arrangements for all its towing services are based on separate agreements.

While approximately 95% of its services consist of towing from points of departure in New York State to points of destination in the same State, most of its tows cross into New Jersey waters, as the New York-New Jersey [fol. 228] boundary follows the middle of the river and, because the navigable channel of the river for some seven or eight miles lies west of the boundary line. A small amount, less than 5%, of plaintiff's towing service is rendered between points in New Jersey adjacent to the Hudson River or New York Harbor and points outside the harbor in New York State.

The Commission held that plaintiff was engaged in interstate commerce as "a common carrier by water by towing vessels in the performance of towage of non-self-propelled freight-carrying vessels between points within New York Harbor, New York, and New Jersey, and Waterford, New York * * * and intermediate points on the Hudson River." In making its finding that the plaintiff, pursuant to the Act, is a common carrier, because it held itself out

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the vessels towed and not against their cargoes. The agreed towage charges depend upon the size of the vessel towed and her carrying capacity, but the volume, character or weight of the cargo is of no other concern to plaintiff. The rate is lower if the barge is towed with others in a flotilla which plaintiff schedules for its customers to leave New York Harbor on certain days of the week or to leave Albany, New York, or some other point on the Hudson, on certain other days of the week. The regular service is maintained under contracts to meet the needs of certain customers. Other customers who can wait for their service until the regular flotilla is towed are given the benefit of the lower unit cost. If a customer desires individual service on a certain date, the rate is higher.

as such, the Commission referred in particular to the testimony of plaintiff's president set forth in the footnote.[1c] [fol. 229] Plaintiff began this suit, pursuant to 28 U. S. C. A. §§ 41(27-28) and 43-48, praying that the Commission

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[1c] "Q. Within the range of your operation, with credit considerations being favorable, contents of the barges being what you think they should be, will you tow for anyone seeking your services? A. We are like to, yes • • • We don't hold ourselves out at all. As a rule, we do take orders, as I mentioned. I think that 12 or 13 percent of our business is miscellaneous business. People will call up today and say that they want us to take a barge from here to there. We ask what kind of barge it is and how much it carries, and we give them a price, and we do that job. The rest is all by yearly or regular arrangements with customers, even down to the naming of the barge that they want towed • • • We have some on the blacklist, whom we do not tow, because we know that they don't pay • • •

"Q. But if there is some boat-owner who may not have a yearly contract with you—and provided that the vessel and the cargo and the credit arrangement are satisfactory—you will tow his boat in that fleet? A. Surely—if he gives us an order for it before the tow starts."

The Commission also pointed out that that same witness "testified that in the tows that leave New York nightly for up-river points, 'we have practically no limits; we take all that will come'; and explained that by 'all that will come' he meant, 'individual customers or people who have made arrangements with us. • • • We must have the order for the barge before the barges leave the stake boat.' He further testified that arrangements for a particular towing job could be entered into over the telephone, and upon inquiry whether such an arrangement would be entered into with persons with whom he had had no prior dealings, replied: 'We would want to know something about them. If it was out of the blue, we would want to know who he was, and what he had to go, before we would give him a price.' Sometimes prepayment of charges has been required. As to the breadth of applicant's willingness to transport: Witness testified that 'Having been there since 1837, we pretty much know every manufacturer on the river. We go to him and ask him for a contact, and show him what kind

be ordered to grant plaintiff's petition to dismiss its application or, in the alternative, that this court direct the Commission to issue to plaintiff a certificate as a contract carrier.[14] The evidence presented at the hearing before this court consisted solely of the petitions filed before, the testimony presented to, and the opinion, findings and orders of, the Commission.

[fol. 230] FRANK, Circuit Judge:

1. Plaintiff contends that, as a tower, it is not a "carrier by water" within the meaning of the Act. We cannot agree. Plaintiff literally "engages in the transportation by water of * * * property * * * for compensation," which is the test under § 302 (c) and (d). For the dictionary tells

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of service we can give, and he gives us the contract.' And again, respecting the daily towing schedules: 'The business has been going on for so long that everybody knows it.'"

Division 4 noted the testimony that plaintiff sometimes refused requests for services when they could not be rendered without injuring one of the regular customers, saying, "How such injury could result is not explained, and, in view of the evidence that there is practically no limit to the number of barges it can include in a flotilla, the statement is unintelligible." The Commission regarded as immaterial the fact that plaintiff frequently had declined to perform towage unless it was given a release from all liability, including liability for negligence."

The Commission stated: "We find that the evidence discloses the fact of a general holding out tempered by prudence, a desire for business rather than a desire to exclude any. We find as a fact that applicant holds itself out to the public to tow for anyone with ability and willingness to pay for the service. Such a holding out, accompanied by performance, constitutes one a common carrier."

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[14] National Water Carriers Association, Inc., and The Boston Towing Company, having been permitted to intervene in the Commission's proceedings, sought intervention in this suit. Objections to these interventions were made but were later withdrawn and the interventions were accordingly permitted.

us that, nautically, to transport is "to haul a vessel by hawsers." And a barge is both a "vessel" and "property." Section 302(h) states that transportation "includes the use of any transportation facility" and § 302(g) includes, in the term "transportation facility," "any vessel," while "vessel," in turn, is defined in §302(f) to mean "any watercraft."[1a] Plaintiff, however, argues that § 302(g) also defines "transportation facility" to include "any * * * wharf," and yet the Commission has held that wharfingers are not within the Act;[2] but the Commission so held because the legislative history showed a clear Congressional intent to exclude wharfingers. Finally, and most important, § 303(f)(2) which expressly excludes certain kinds of towage would be meaningless if towage generally were not included; and plaintiff's activities are not within the excluded varieties of towage.

2. Plaintiff argues that even if it be a "carrier by water" within the meaning of the Act, it is not a "common carrier by water." Plaintiff points to decisions in which, before the passage of this Act, persons engaged in activities such as that in which it engages were held not to be common carriers. It is suggested that, accordingly, the constitutional power of Congress to regulate plaintiff as a common carrier is doubtful and that a statute should be so construed as to avoid raising grave doubts as to its constitutionality. But, since *Nebbia* v. *New York*, 291 U. S. 502 and *Olsen* v. [fol. 231] *Nebraska*, 313 U. S. 236, there have been no such doubts; for it is now well settled that "there is no closed class or category * * * of businesses affected with a public interest." There is no need to repeat here what was said in *Fordham Bus Corporation* v. *U. S.*, 41 Fed. Supp. 712, 715, where this very question was fully discussed with reference to the regulation of motor carriers under Part II of this Act.[3]

[1a] Cf. *Union Stockyard & Transit Co.* v. *U. S.*, 308 U. S. 213, 217.

[2] *Status of Wharfingers*, 215 I. C. C. 633.

[3] Cf. *Alton R. Co.* v. *U. S.*, 315 U. S. 15, 23 which indicated that one who was a "contract carrier" under a state permit can claim "grandfather" rights as a common carrier under Part II of this Act.

We fail to understand plaintiff's contention that, because it was not a common carrier for purposes of liability under the Harter Act or otherwise in Admiralty or at common law, this Act should be construed as not intended to include it as a common carrier; for in § 320(d) [4] Congress showed that it had in mind the difference between the question of liability and that of regulation. By labeling persons such as plaintiff "common carriers" in this Act, they do not become such for all purposes; this is made clear by § 302 which, in so labeling them, expressly states that it does so "for the purposes of this Act." And see *Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 199, 211-212; *United States* v. *Brooklyn Terminal*, 249 U. S. 296, 304; *Liverpool Steam Company* v. *Phenix Insurance Co.*, 129 U. S. 397, 440.

That plaintiff supplies merely the hauling power and has no contractual relations with those who ship their goods on the barges towed by plaintiff is irrelevant, as appears from decisions as to similar situations with respect to railroad carriers under Part I of this Act.[5]

[fol. 232] Plaintiff urges that Congress could not have intended it to be classified as a common carrier under the Act because it was not such before the passage of the Act and because the "grandfather" clause, § 309(a), provides that, if a carrier was in operation "as a common carrier by water" on a stated date before the Act was enacted, it is entitled to a "grandfather" certificate. But clearly what Congress meant was that a person is entitled to such a certificate if, on the specified date before the enactment of the legislature, it had been engaged in activities which,

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[4] §320(d) reads: "Nothing in this part shall be construed to affect any law of navigation, the Admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation or custom not in conflict with the provisions of this Part."

[5] *U. S.* v. *California*, 297 U. S. 175, 182-183; *Union Stock Yard & Transit Co.* v. *U. S.*, 208 U. S. 213, 219; *U. S.* v. *Brooklyn Terminal*, 249 U. S. 296, 305; *Belt Ry. Co.* v. *U. S.*, 168 F. 542, 544; *U. S.* v. *Sioux City Stockyard Co.*, 162 F. 556.

after the statute went into effect, would constitute it a common carrier.[6]

There is substantial evidence to sustain the Commission's finding that plaintiff so "holds itself out to the general public" [see § 302(d)] that it is a "common" and not a "contract carrier." The differentiation between a "common" and a "contract" carrier is well-explained by Judge McGuire in *Doyle Transfer Co.* v. *U. S.*, 45 Fed. Supp. 691[7]; that case, to be sure, related to Part II of the Act, but the definitions of "common" and "contract" carriers in Parts II and III are identical (excepting that in the latter "by water" appears in the place of "by motor vehicle.") See also *Fordham Bus Corporation* v. *U. S.*, 41 Fed. Supp. 712, 717-718.

It goes without saying that, since there is substantial evidence to support the Commission's finding, we must sustain it, whether or not we would have made that finding,[7a] and also that it is not our province to consider the wisdom of the legislation. On the basis of the finding, we hold that [fol. 233] the Commission's conclusion and order was not erroneous.

3. Plaintiff argues that, in any event, it is not engaged in transportation, under § 302(i)(I), "wholly by water from a place in a state to a place in another state." Literally, of course, it is, for it transports from a "place" in the waters of New York to a "place" in the waters of New Jersey.

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[6] Note that the "grandfather" clause of Part II, as to motor carriers, § 206(f), is identical in language with § 309(f) and see *Alton R. Co.* v. *U. S.*, 315 U. S. 15, 23; cf. *Fordham Bus Corp.* v. *U. S.*, 41 Fed. Supp. 712.

[7] See the legislative history and the Commission decisions there cited and quoted.

[7a] See, e. g., *Sperry Gyroscope Co., Inc.* v. *N. L. R. B.*, 129 F. (2d) 922, 924 (C. C. A. 2) and cases there cited in note 1. That there were dissenting opinions filed by some of the Commissioners is immaterial. Cf. *Virginian Ry.* v. *U. S.*, 272 U. S. 658, 674-675.

The language of Part I, § 1(I), as to railroads is virtually the same, i. e., "from one state * * * to any other state." That language was construed, many years before the enactment of Part III, to apply to continuous transportation beginning in a state, running through a second state, and returning to the first state. *Missouri Pacific R. R. Co.* v. *Stroud*, 267 U. S. 404; *United States* v. *D. L. & W. R. Co.*, 152 Fed. 269. It is true that this interpretation has been said (152 Fed. at 272) to be strengthened by the fact that § 1(2) in Part I provides that jurisdiction over railroads shall not apply "to transportation * * * wholly within one state." But § 303(h) in Part III similarly precludes jurisdiction, as to water carriers, over "intra-state transportation." As the Commission says, if the words "wholly within a state" in Part I fortify the conclusion that it has jurisdiction under Part I over transportation between points in a single state through another state, the language quoted above from § 303(h) fortifies a similar conclusion under Part III.

Plaintiff points to the fact that, in 1935, Congress, in §203(10), Part II, as to interstate motor carriers, conferred jurisdiction by expressly defining "interstate commerce" to mean "commerce between any place in a state and any *place in another state or between places in the same state through another state.*"[8] Plaintiff argues that the omission from the definition of "interstate transportation" in Part III of the words we have italicized in this provision in Part II conclusively shows that Congress did not intend to confer such jurisdiction as to water carriers. [fol. 234] Had Parts II and III been enacted at the same time, that argument would have been most persuasive; but Part III was enacted in 1940, five years after the enactment of Part II. Congress must be deemed to have known in 1940 that the courts had held that the language employed in Part I had precisely the meaning of the language employed in Part II. Congress then had a choice of two methods of expressing the same intention; therefore, no significance can be given to the fact that, when it enacted Part III in 1940, it selected the language which it

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[8] Italics added.

had used in Part I rather than the language which it had used in Part II.[9]

Plaintiff places much reliance on *Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549. There this very plaintiff was subject to a tax imposed by a statute of the State of New York, for the privilege of doing business as a corporation, equal to a percentage of the gross earnings on transportation originating and terminating in that State; the statute expressly provided that the tax would not apply to earnings derived from interstate business. The State assessed the tax on earnings from towage between New York ports which passed through New Jersey waters. Plaintiff in that case contended that such traffic was interstate and not constitutionally taxable by the State, but the Supreme Court held otherwise. There is substantially no difference between the way traffic is now handled by plaintiff and the way it was then handled as described in that opinion. Accordingly, plaintiff argues that it has been held that it is not engaged in interstate commerce, and is therefore not subject to the Commission's jurisdiction. In so far as [fol. 235] this is a contention that Congress lacks the power constitutionally to regulate plaintiff under the Commerce clause, the contention must fail. Criteria employed in determining whether a state may validly tax because of the Commerce clause are not applicable to a determination whether the federal government may validly regulate under that clause. The *Sohmer* case itself relies upon, and cites, *Lehigh Valley R. R.* v. *Pennsylvania*, 145 U. S. 192, and *Ewing* v. *City of Leavenworth*, 226 U. S. 464, where that distinction is clearly made. See also *Hawley* v. *Kansas City Southern Ry. Co.*, 187 U. S. 617, 621.

Plaintiff also suggests that the *Sohmer* decision is a finding of fact, conclusive for all purposes, that it is engaged in intrastate commerce. The answer is that the "finding" was there made with reference to the power of the State to tax. In the instant case, the Commission, after a hearing, has made an express finding that plaintiff

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[9] These comments also answer a possible suggestion based upon the definition of "interstate commerce," similar to that used in Part II, in §402(a)(6) of Part IV, that Part having been enacted in 1942, two years after the enactment of Part III.

is engaged in interstate transportation as that term is defined in Part III.[10]

Pursuant to F. R. C. P. 52, we are filing herewith our findings of fact and our separate conclusions of law; as provided in that Rule, we will entertain a motion by either party that we amend the findings or make additional findings.

Dismissed.

Jerone N. Frank, U. S. C. J.; Alfred C. Coxe, U. S. D. J.; John Bright, U. S. D. J.

[fol. 235a] [File endorsement omitted.]

[fol. 236] IN UNITED STATES DISTRICT COURT

CORNELL STEAMBOAT COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant

Findings of Fact and Conclusions of Law—Filed July 9, 1943

The following are our findings of fact and separate conclusions of law made pursuant to F. R. C. P. 52:

FINDINGS OF FACT

1. Plaintiff filed an application with the Interstate Commerce Commission asking for a certificate as a contract carrier by water under §309(f) of Part III of the Interstate Commerce Act or for such certificate as it might be entitled to procure, and, simultaneously, petitioned the Commission to dismiss its application for lack of jurisdiction over plaintiff. A hearing was duly held at which evidence

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[10] The Commission urged that we apply the doctrine of such cases as *Gray* v. *Powell*, 314 U. S. 402, 413, as to the weight to be given to administrative interpretations of the statute. We have found it unnecessary to do so. Cf. *Hartford Electric Light Company* v. *F. P. C.*, 131 F. (2d) 953, 966 (C. C. A. 2).

was taken before a Commission Examiner; on exception to the Examiner's proposed report, Division 4 of the Commission, after argument, made findings of fact and an order. On reargument before the full Commission, it approved the findings and order of Division 4 with a slight modification.

2. The Commission found that plaintiff had held itself out as a common carrier by water for compensation, as that term is defined in the Act, in the performance of towage of non-self-propelled vessels "between points within New York Harbor, New York, and New Jersey * * * and Waterford, New York, and intermediate points on the Hudson River," and that it had performed such services on January 1, 1940 and continuously since then.

3. There was substantial evidence before the Commission to sustain those findings.

4. The Commission denied plaintiff's motion to dismiss its application and ordered that a certificate of convenience [fol. 237] and necessity issue to plaintiff as a common carrier by water in accordance with those findings and pursuant to §309(a) of the Act.

5. The evidence presented to this court on the hearing of this case consisted solely of plaintiff's application and petition before the Commission; the evidence considered by the Commission; a proposed report made by a Commission Examiner who heard the evidence; the opinion, findings and order of Division 4 of the Commission; and the opinion, findings and order of the full Commission.

6. The undisputed evidence is that, while 95% of plaintiff's services have consisted of towing, through the Hudson River, from points of departure in New York State to points of destination in that State, yet most of its tows crossed into New Jersey waters for some seven or eight miles and were obliged to do so because, for that distance, the navigable channel of the Hudson River lies west of the New York-New Jersey boundary line; and that something less than 5% of plaintiff's business consisted of towing between points in New Jersey adjacent to the Hudson River or New York Harbor and points outside the harbor in New York State.

[fols. 238-239] CONCLUSIONS OF LAW

1. The findings of fact made by the Commission are not erroneous.

2. Within the meaning of Part III of the Act, plaintiff is engaged in transportation "wholly by water from a place in a state to a place in another state."

3. The order of the Commission is supported by its findings and is not erroneous.

4. The statute, so far as made applicable to the plaintiff by the order of the Commission, is not violative of any part of the Constitution of the United States.

Jerome N. Frank, U. S. C. J.; Alfred C. Coxe, U. S. D. J.; John Bright, U. S. D. J.

Dated: New York, N. Y. July 7, 1943.

[fol. 240] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil No. 21-35

CORNELL STEAMBOAT COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant,

and

INTERSTATE COMMERCE COMMISSION, Intervening Defendant,

and

BOSTON TOWBOAT COMPANY, Intervening Plaintiff,

and

NATIONAL WATER CARRIERS ASSOCIATION, INC., Intervening Defendant

FINAL DECREE AND JUDGMENT—July 30, 1943

The above entitled case having come on for final hearing on June 22, 1943, before a specially constituted district court of three judges, as required by the Urgent Deficiencies Act of October 22, 1913; and the court having considered the written and oral argument of counsel and the

evidence introduced; and the court having heretofore entered findings of fact, conclusions of law, and a written opinion dismissing the petition; it is

Ordered, Adjudged, and Decreed, this 30th day of July, [fol. 241] 1943, that the petition be and the same is hereby dismissed, with costs waived.

Jerome N. Frank, United States Circuit Judge. Alfred C. Coxe, United States District Judge. John Bright, United States District Judge.

July 30th, 1943.

[fol. 242] In the District Court of the United States

[Title omitted]

Stipulation Agreeing as to Form of Final Decree and Judgment—July 29, 1943

It is hereby stipulated by and between the parties to the above-styled cause that the attached Final Decree and Judgment is agreed to as to form and that the defendants shall waive their costs in said proceeding.

This 29 day of July, 1943.

Kirlin Campbell Hickox Keating & McGrann, Counsel for Plaintiff. E. M. Reidy, per R. L. P., Counsel for Intervening Defendant, Interstate Commerce Commission. Robert L. Pierce, Counsel for the United States. Bingham, Dana & Gould, Counsel for Intervening Plaintiff, Boston Towboat Company. Foley & Martin, Counsel for Intervening Defendant, National Water Carriers Asso., Inc.

[File endorsement omitted.]

[fol. 243] In the District Court of the United States

[Title omitted]

Order Allowing Appeal of Cornell Steamboat Co.—Aug. 10, 1943

The petition of Cornell Steamboat Company, plaintiff, for an appeal to the United States Supreme Court from the final decree and judgment entered herein on August 2, 1943

having been presented, together with its assignment of errors and statement as to jurisdiction, in accordance with Rule 12 of the Rules of the United States Supreme Court, it is

Ordered that an appeal be and is hereby allowed to the Supreme of the United States by Cornell Steamboat Company, plaintiff, from the final decree and judgment entered [fol. 244] herein on August 2, 1943 and dated July 30, 1943, and that an appropriate citation issue returnable within forty (40) days from this date, and that the appropriate record, in accordance with the provisions of Title 28 U. S. C., Secs. 47 and 47a and in accordance with the Rules of the United States Supreme Court, be docketed in said Court within the said forty days, and it is further

Ordered that the appellant give a bond with good and sufficient surety in the sum of $250 for costs on said appeal.

Dated, New York, August 10, 1943.

Simon H. Rifkind, U. S. D. J.

W. V. O.

[fol. 245] In the District Court of the United States

[Title omitted]

Petition of Cornell Steamboat Co., for Allowance of Appeal—Aug. 10, 1943

Your petitoner, Cornell Steamboat Company, respectfully prays that, in accordance with 28 U. S. C. Sec. 47 and 47a, the appeal of Cornell Steamboat Company, plaintiff, from this Court to the United States Supreme Court from the decree and judgment entered herein on August 2, 1943 be allowed and that the bond for costs on appeal with good and sufficient surety in the sum of $250, submitted herewith, be approved.

The said plaintiff submits herewith for filing its assignment of errors together with its statement as to the juris-[fol. 246] diction of the United States Supreme Court, pursuant to Rule 12 of the Rules of said Court.

Dated, New York, August 10, 1943.

Yours, etc., Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Plaintiff, by Robert S. Erskine, a Member of the Firm. 120 Broadway, Borough of Manhattan, City of New York.

[fol. 247] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENTS OF ERROR OF CORNELL STEAMBOAT CO.—Aug. 10, 1943

Cornell Steamboat Company, plaintiff in the above-entitled suit, hereby assigns error in the opinion, findings, conclusions and judgment of the Court herein as follows:

1. The Court erred in failing to find and conclude that plaintiff is not engaged in the business of transportation by water nor in the business of a carrier by water within the provisions of Part III of the Transportation Act of 1940, and in failing to enjoin, set aside, suspend and annul the certificate and order of the Interstate Commerce Commission herein on the said grounds.

2. The Court erred in failing to find that, on the undis-[fol. 248] puted facts in the record, plaintiff is an independent tower and, as such, is not a person or party within the definitions and provisions of Part III of the Transportation Act of 1940, and therefore is not subject to regulation by the Interstate Commerce Commission under the said Act.

3. The Court erred in seizing upon, lifting from the context, and adopting only a portion of an unique definition of the word "transport", contained in an unnamed dictionary, and utilizing such with resulting distortion as the test of the applicability to the Plaintiff of Part III of the Act.

4. The Court erred in failing to interpret the provisions of Part III, of the Act and the intent of Congress as set out herein, in accordance with the common and accepted meaning of the language thereof, as used by Congress in earlier legislation relating to water carriers, and as heretofore defined by the courts.

5. The Court erred in its interpretations of the language of Sections 302(c)(d); Section 303(f) (2); Section 320(d); and Section 309(a), by failing to give to the words therein the common and accepted meaning as used by Congress in earlier legislation relating to water carriers and as previously defined by the courts.

6. The Court erred in finding and concluding that plaintiff is subject to regulation under Part III of the Act of 1940 as a common carrier, when in fact and in law the plaintiff is not a common carrier, thereby seriously affecting the legal status and rights of the plaintiff and depriving the plaintiff of its liberty and property without due [fol. 249] process of law.

7. The Court erred in finding and concluding that plaintiff has held itself out to the public as a common carrier by water.

8. The Court erred in failing to find on the undisputed facts in the record that plaintiff, if subject to Part III of the Act at all should be classified only as a contract carrier.

9. The Court erred in failing to interpret the provisions of Section 302 (i)(1) with respect to interstate commerce in accordance with the plain meaning of the language thereof.

10. The Court erred in finding that in spite of the language of Section 302(i)(1) towage services rendered between points in New York State are interstate services under the provisions of Part III of the said Act.

11. The Court erred in failing to find that Congress intended the provisions of Section 302 to provide for water carriers definitions of interstate commerce wholly different from those provided for rail and motor carriers under Parts I and II of the said Act.

12. The Court erred in its Finding of Fact No. 6, because there is no evidence in the record that the navigable channel of the river for the seven or eight miles referred to is on the New Jersey side of the river, or that plaintiff's tows are obliged to navigate or do actually navigate on the New Jersey side of the river through that stretch.

[fol. 250] 13. The Court erred in dismissing plaintiff's petition.

Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for plaintiff, Office & P. O. Address, 120 Broadway, Borough of Manhattan, New York 5, N. Y.

[fols. 251-252] [Citation in usual form omitted in printing.]

[fol. 253] In the District Court of the United States

[Title omitted]

Petition of Boston Tow Boat Co., for Allowance of Appeal—August 30, 1943

Your petitioner, Boston Tow Boat Company, respectfully prays that, in accordance with 28 U. S. C. Secs. 47 and 47a, the appeal of Boston Tow Boat Company, intervening plaintiff in the above entitled action, from this Court to the United States Supreme Court from the decree in judgment entered herein on August 2, 1943 be allowed, and that the bond for costs on appeal with good and sufficient surety in the sum of $250, submitted herewith, be approved.

The said intervening plaintiff submits herewith for filing its assignment of errors and adopts by reference the statement as to the jurisdiction of the United States Supreme Court filed in this action by Cornell Steamboat Company, plaintiff petitioner for appeal.

Dated, New York, August 30, 1943.

Bingham, Dana & Gould, Albert T. Gould, Charles S. Bolster, by Charles S. Bolster, a Member of the Firm, 1 Federal Street, Boston 10, Massachusetts.

[fol. 254] In the District Court of the United States

[Title omitted]

Order Allowing Appeal of Boston Tow Boat Co.—August 30, 1943

The petition of Boston Towboat Company, intervening plaintiff, for an appeal to the United States Supreme Court from the final decree and judgment entered herein on August 2, 1943 having been presented, together with its assignment of errors, and said intervening plaintiff having adopted by reference the statement as to the jurisdiction of the United States Supreme Court heretofore filed herein by Cornell Steamboat Company in its appeal to said Court allowed on August 10, 1943, it is

Ordered that an appeal be and is hereby allowed to the Supreme Court of the United States by Boston Towboat

Company, intervening plaintiff, from the final decree and [fol. 255] judgment entered herein on August 2, 1943 and dated July 30, 1943, and that an appropriate citation issue returnable within forty (40) days from this date, and that the appropriate record, in accordance with the provisions of Title 28 U. S. C., Secs. 47 and 47a and in accordance with the Rules of the United States Supreme Court, be docketed in said Court within the said forty days, and it is further

Ordered that the appellant give a bond with good and sufficient surety in the sum of $250. for costs on said appeal.

Dated, New York, August 30, 1943.

Samuel Mandelbaum, U. S. D. J.

[fol. 256] In the District Court of the United States

[Title omitted]

Assignments of Error of Boston Tow Boat Co.—August 30, 1943

Boston Tow Boat Company, intervening plaintiff in the above entitled suit, hereby assigns error in the opinion, findings, conclusions and judgment of the Court herein as follows:

1. The Court erred in failing to find and conclude that plaintiff is not engaged in the business of transportation by water nor in the business of a carrier by water within the provisions of Part III of the Transportation Act of 1940, and in failing to enjoin, set aside, suspend and annul the certificate and order of the Interstate Commerce Commission herein on the said grounds.

2. The Court erred in failing to find that, on the undisputed facts in the record, plaintiff is an independent tower and, as such, is not a person or party within the definitions and provisions of Part III of the Transportation Act of 1940, and therefore is not subject to regulation by the Interstate Commerce Commission under the said Act.

[fol. 257] 3. The Court erred in failing to interpret the provisions of Part III, of the Act and the intent of Congress as set out therein, in accordance with the common and accepted meaning of the language thereof, as used by Congress in earlier legislation relating to water carriers, and as heretofore defined by the courts.

4. The Court erred in its interpretations of the language of Sections 302(c)(d); Section 303(f)(2); Section 320(d); and Section 309(a), by failing to give to the words therein the common and accepted meaning as used by Congress in earlier legislation relating to water carriers and as previously defined by the courts.

5. The Court erred in finding and concluding that plaintiff is subject to regulation under Part III of the Act of 1940 as a common carrier, when in fact and in law the plaintiff is not a common carrier, thereby seriously affecting the legal status and rights of the plaintiff and depriving the plaintiff of its liberty and property without due process of law.

6. The Court erred in dismissing plaintiff's petition.

Bingham, Dana & Gould, 1 Federal Street, Boston 10, Massachusetts, Attorneys for Intervening Plaintiff.

[fols. 258-259] Citation in usual form omitted in printing.

[fol. 260] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER, CONSENT AND STIPULATION RE CERTIFICATION OF ORIGINAL DOCUMENTS

On the annexed consent and stipulation, and on motion of Kirlin, Campbell, Hickox, Keating & McGrann, attorneys for Cornell Steamboat Company, plaintiff-appellant, and on motion of Bingham, Dana & Gould, attorneys for Boston Towboat Company, intervening plaintiff-appellant, it is

Ordered that the Clerk of this Court be and is hereby directed to certify the originals of the following documents instead of a transcript thereof, pursuant to the provisions of Title 28 U. S. Code, Section 47a, to be transmitted to the Supreme Court of the United States in the above entitled appeal:

1. Petition of Plaintiff.
2. Answer of United States of America.
3. Answer of Interstate Commerce Commission.

[fol. 261] 4. Intervention of Interstate Commerce Commission.

5. Notice of motion of National Water Carriers Association, Inc. to intervene, with affidavit of Chester H. Sanders annexed.

6. Petition of Boston Tow Boat Company to intervene.

7. Certified record of Interstate Commerce Commission.

8. Opinion.

9. Findings of fact and conclusions of law.

10. Final decree and judgment.

11. Petition of Cornell Steamboat Company for and order allowing its appeal.

12. Assignment of errors of Cornell Steamboat Company.

13. Statement of Cornell Steamboat Company as to jurisdiction of United States Supreme Court with appendices A to G inclusive annexed.

14. Notice of Cornell Steamboat Company directing attention to Rule 12 (3) of the United States Supreme Court with admission of service of copies of said notice, citation on its appeal, its statement as to jurisdiction, its petition for and order allowing its appeal and of its assignment of errors.

15. Citation on appeal of Cornell Steamboat Company.

16. Petition of Boston Towboat Company adopting statement of Cornell Steamboat Company as to jurisdiction and for its appeal and order allowing its appeal.

17. Assignment of errors of Boston Towboat Company.

18. Admission of service of petition for and order allowing appeal of Boston Towboat Company, citation thereon, and its assignment of errors with waiver of notice provided for in Rule 12 (3) and waiver of opposition to jurisdiction pursuant to said rule.

19. Citation on appeal of Boston Towboat Company.

And it is further

Ordered that a certified copy of this order be transmitted to the Supreme Court of the United States with the afore-[fol. 262] said documents.

Dated, New York, September 14th, 1943.

Hulbert, U. S. D. J.

Consent and Stipulation

We hereby consent to the entry of the foregoing order and stipulate that the documents set forth in the foregoing

order, together with a certified copy of said order to be transmitted therewith, shall constitute the record in the above entitled appeal.

Dated, September 1, 1943.

Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Plaintiff-Appellant. Robert L. Pierce, Special Assistant to the Attorney General of the United States, Attorney for United States of America, Defendant-Appellee. E. M. Reidy, Attorney for Interstate Commerce Commission, Intervening Defendant-Appellee. Bingham Dana & Gould, Attorneys for Boston Towboat Company, Intervening Plaintiff-Appellant. Foley & Martin, Attorneys for National Water Carriers Association, Inc., Intervening Defendant-Appellee.

[fols. 263-267] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 268] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CONVENING JUDGES AND FIXING TIME OF HEARING—June 1, 1943

It appearing from the petition herein that this suit is brought to suspend, set aside and annul a certain order of the Interstate Commerce Commission and to perpetually enjoin the enforcement thereof, and for other specified relief, and the defendant's answer to said petition and the intervention and answer of the Interstate Commerce Commission having been served,

Now, on motion of Kirlin, Campbell, Hickox, Keating & McGrann, attorneys for the plaintiff, and pursuant to the Urgent Deficiencies Act, 38 Stat. 220, Title 28 U. S. C. Section 47, it is

Ordered that the issues in this suit and any ad interim application subject to the provisions of said Urgent Deficiencies Act shall be heard and determined by Honorable John Bright, the undersigned District Judge, together with Honorable Alfred C. Coxe, District Judge, and Honorable Jerome N. Frank, Circuit Judge, the latter two judges

having been called to the assistance of the undersigned District Judge in accordance with said Statute, and it is further

[fol. 269] Ordered that the issues in this suit be brought on for final hearing and shall be heard before the said three judges on June 22, 1943, in Room 618 of the United States Court House, Foley Square, Borough of Manhattan, City of New York, at two o'clock in the afternoon, or as soon thereafter as counsel can be heard, and it is further

Ordered that service of a copy of this order upon counsel for the defendant and upon counsel for the Interstate Commerce Commission, intervening defendant, not less than five days before said hearing shall be sufficient notice of said hearing.

Dated, New York, June 1, 1943.

John Bright, U. S. D. J.

[fol. 270] In United States District Court

[Title omitted]

Stipulation and Addition to Record—September 18, 1943

It Is Hereby Stipulated and Agreed that copies of the following papers may be certified as part of the record on the above entitled appeal in addition to the papers set forth in the order and stipulation as to the record heretofore filed herein:

1. Order convening Judges.
2. Supplemental stipulation as to record.

Dated, September 18, 1943.

Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Plaintiff-Appellant. Robert L. Pierce, Special Assistant to the Attorney General of the United States, Attorney for United States of [fols. 271-272] America, Defendant-Appellee. E. M. Reidy, Attorney for Interstate Commerce Commission, Intervening Defendant-Appellee. Bingham, Dana & Gould, Attorneys for Boston Towboat Company, Intervening Plaintiff-Appellant. Foley & Martin, Attorneys for National Water Carriers Association, Inc., Intervening Defendant-Appellee.

[fol. 273] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS AND DESIGNATION OF RECORD—Filed September 25, 1943

Cornell Steamboat Company and Boston Towboat Company, the appellants, each adopts its assignment of errors as its statement of the points to be relied upon and represents that the whole of the record as filed is necessary for the consideration of the case.

Dated, New York, September 15, 1943.

Robert S. Erskine, Counsel for Appellant, Cornell Steamboat Company, 120 Broadway, New York 5, N. Y. Charles S. Bolster, Counsel for Appellant, Boston Towboat Company, 1 Federal Street, Boston 10, Massachusetts.

To: Charles Elmore Cropley, Esq., Clerk of the Supreme Court of the United States, Washington, D. C.

[fols. 274-279] Robert L. Pierce, Esq., Special Assistant to the Attorney General of the United States, Attorney for United States of America, Defendant-Appellee, Washington, D. C.

E. M. Reidy, Esq., Attorney for Interstate Commerce Commission, Intervening Defendant-Appellee, Washington, D. C.

Foley & Martin, Esqs., Attorneys for National Water Carriers Association, Inc., Intervening Defendant-Appellee, 64 Wall Street, New York, N. Y.

[fol. 280] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—October 25, 1943

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 47,877, 47,878, Southern New York, D. C. U. S., Term No. 384. Cornell Steamboat

Company, Appellant, vs. The United States of America, Interstate Commerce Commission and National Water Carriers Association, Inc. Term No. 385. Boston Towboat Company, Appellant, vs. The United States of America, Interstate Commerce Commission and National Water Carriers Association, Inc. Filed September 25, 1943. Term No. 384 O. T. 1943. 385 O. T. 1943.

(9256)

FILE COPY

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SEP 25 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 384

CORNELL STEAMBOAT COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND NATIONAL WATER CARRIERS ASSOCIATION, INC.

No. 385

BOSTON TOWBOAT COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND NATIONAL WATER CARRIERS ASSOCIATION, INC.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION.

ROBERT R. ERSKINE,
Counsel for Appellant,
Cornell Steamboat Co.;
ALBERT T. GOULD,
CHARLES S. BOLSTER,
Counsel for Appellant,
Boston Towboat Co.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

CIVIL No. 21-35.

CORNELL STEAMBOAT COMPANY,
Plaintiff,
against
UNITED STATES OF AMERICA,
Defendant,
AND
INTERSTATE COMMERCE COMMISSION,
Intervening Defendant,
AND
BOSTON TOWBOAT COMPANY,
Intervening Plaintiff,
AND
NATIONAL WATER CARRIERS ASSOCIATION, INC.,
Intervening Defendant.

JURISDICTIONAL STATEMENT OF CORNELL STEAMBOAT COMPANY, PLAINTIFF, PURSUANT TO RULE 12 OF THE RULES OF THE UNITED STATES SUPREME COURT.

1.

The Supreme Court of the United States has jurisdiction to review on appeal the final judgment here in question under the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 219-220, 28 U. S. C. Secs. 47, 47a and Sec. 238 of the Judicial Code as amended, 28 U. S. C. Sec. 345.

2.

The final decree and judgment of the United States District Court for the Southern District of New York sought to be reviewed herein is dated July 30, 1943, and was entered in that court on August 2, 1943.

The application for appeal in support of which this statement is made is presented on August 10, 1943.

3.

The Statute involved is the Transportation Act of 1940 (September 18, 1940, Ch. 722, 54 Stat. 899), which may be cited as Part III of the Interstate Commerce Act (49 U. S. C. 901, 54 Stat. 929).

This statute subjected carriers by water to regulation by the Interstate Commerce Commission.

4.

Cornell Steamboat Company, the plaintiff, filed a petition in the United States District Court for the Southern District of New York, invoking the jurisdiction of that court under the provisions of U. S. C. Title 28, Secs. 41 (28) and 43-48 inclusive, to enjoin, set aside, suspend and annul a certificate and order of the Interstate Commerce Commission dated February 2, 1943, in which the Commission ruled that plaintiff may continue its business of furnishing towage services for hire only on the basis that it is a common carrier by water and subject to the rules and regulations of the Commission under the provisions of Part III of the Transportation Act of 1940, and denied the petition of the said Cornell Steamboat Company to dismiss its application for a permit to engage in the business of a contract carrier.

The plaintiff contends that, on the undisputed facts, its business is solely that of furnishing towage services under contract, as an independent tower, that it is not a carrier,

is not engaged in the business of a carrier, and is not subject to the Act. It also contends that if it be subject to Part III of the Act, its status in any event should be limited to that of a contract carrier, and that its towage services between New York City and points in New York State on the Hudson River are not interstate commerce within the meaning of Part III, Sec. 302 (i) (1) of the Interstate Commerce Act.

After a final hearing before three judges, convened pursuant to 28 U. S. C. 47, 38 Stat. 220, the District Court dismissed plaintiff's petition, holding in its opinion, findings and conclusions that the Commission's certificate and order was not erroneous and that plaintiff, in its business as an independent tower, is a common carrier by water engaged in transportation in interstate commerce within the meaning of Part III of the Interstate Commerce Act and that the statute as applied by the Commission to the plaintiff is not violative of any part of the United States Constitution.

There are appended hereto copies of the opinion (Appendix A) and the findings of fact and conclusions of law (Appendix B) of the District Court, the Report of the Commission on Reargument (Appendix C) and the certificate and order thereon dated February 2, 1943 (Appendix D), the Report of the Commission (Appendix E) and the certificate and order thereon dated June 15, 1943 (Appendix F), and the Report of the Examiner (Appendix G).

Dated, August 10, 1943.

KIRLIN, CAMPBELL, HICKOX, KEATING & MCGRAIN,
Attorneys for Plaintiff,
BY ROBERT S. ERSKINE,
A Member of the Firm;
120 Broadway,
New York, N. Y.

APPENDIX "A".

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Civ. 21-35.

Cornell Steamboat Company, *Plaintiff*,

vs.

United States of America, *Defendant*.

Before Frank, Circuit Judge and Coxe and Bright, District Judges.

Kirlin, Campbell, Hickox, Keating & McGrann (Robert S. Erskine, of Counsel), for plaintiff;
Robert L. Pierce, Special Assistant to the Attorney General, for the United States;
E. M. Reidy, Assistant Chief Counsel, for the Interstate Commerce Commission;
Tom C. Clark, Assistant Attorney General (Daniel W. Knowlton, of counsel) for defendant;
Foley & Martin (James A. Martin and Christopher E. Heckman, of counsel) for National Water Carriers Association, Inc., Intervenors,
Bingham, Dana & Gould (Boston, Mass.) for Boston Tow Boat Company, Intervenors.

Suit by plaintiff against the Interstate Commerce Commission, complaining of an order entered by the Commission pursuant to Part III of the Interstate Commerce Act. Dismissed.

The plaintiff, Cornell Steamboat Company, a New York corporation, filed an application with the Interstate Commerce Commission for a permit as a "contract carrier by water" under Part III of the Interstate Commerce Act, to continue its operation under the so-called "grandfather" clause of that Act as a "contract carrier"; that clause (§ 309) provides for the issuance, without proof that the

public convenience and necessity will be served thereby, of a certificate to a carrier engaged in bona fide operations on January 1, 1940, and continually since then, either as a "contract carrier" or a "common carrier". In the alternative, plaintiff asked that its application be considered one for the appropriate form of authority. In its application plaintiff also stated that it was filing the same without prejudice to its contention that it was not a carrier and that it was not subject to the jurisdiction of the Commission; at the same time, plaintiff filed with the Commission a petition to dismiss its application on the same grounds. Evidence was taken before a Commission Examiner who made a proposed report to the effect that plaintiff was a "grandfather" contract carrier. Exceptions to this report were argued before Division 4 of the Commission which held that the plaintiff was "a common carrier by water," entitled to a "grandfather" certificate as such and that such a certificate should issue. On plaintiff's motion, the matter was re-argued before the full Commission which, with a slight modification,[1] affirmed the opinion and findings of Division 4 and entered an order accordingly.

The evidence before the Commission showed the following: The plaintiff for many years before and on January 1, 1940, and continuously since then, owned tugboats which it used to furnish towage services for hire on the Hudson River between Waterford, New York, and New York City, New York, and upon the waters of New York Harbor or the waters surrounding New York City.[1a] At the time of the hearing, plaintiff owned thirty-three tugs. It furnishes its services to barges, scows and similar vessels which themselves usually carry cargoes. Plaintiff does not

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[1] The modification, pursuant to § 303(g), provided that no certificate was required for towage performed by plaintiff wholly within New York Harbor, since plaintiff is not, as to such towage, a party to any arrangement for the through carriage of the barges towed or their cargoes to points outside New York State.

[1a] Plaintiff was incorporated in 1878 to continue the towing business started in 1837 by the grandfather of its president who has held that position for the past 29 years. From its inception, the business of plaintiff has been, and still is, owned by succeeding generations of the same family.

carry any freight or passengers on its tugs. The tugs merely attach their towing lines to the vessels to be towed and move them to points of destination as directed by the owners or operators of those vessels. Each of those vessels thus towed has its own captain on board; plaintiff's employees have nothing to do with the carrying of any cargo on those vessels. Plaintiff issues no bills of lading or similar documents for any such cargoes, and has no arrangement with anybody except the owners or operators of such vessels.[1b] Over 70% of plaintiff's customers are shippers who own or operate towed barges used in carrying their own merchandise. The largest part of its business is done on time contracts entered into for a period of years; some contracts run for a single year; from 12% to 13% of its business is done under miscellaneous contracts arranged from day to day. Arrangements for all its towing services are based on separate agreements.

[1b] It has no direct or indirect interest in, and often has no knowledge of, the character of those cargoes, or of the origin or final destination thereof. Its responsibilities begin when the vessel is taken in tow and ends when the tow is left at the agreed destination. It has nothing to do with the contractual arrangements between the barge-owners and the cargo-owners as to any forwarding or delivery of the cargo. It takes no part in, and has no interest whatever in, and no knowledge of, the arrangements between the owners of the cargoes and the barge-owners either with respect to freight-rates or with respect to any other terms of their contract to carry. Plaintiff's charges are agreed on in its contracts with the owners or operators of the towed vessels, are not dependent in any way upon the freight monies between those vessels and their cargoes, are direct charges against the barge-owners under its contracts with them, and are secured by maritime liens against the vessels towed and not against their cargoes. The agreed towage charges depend upon the size of the vessel towed and her carrying capacity, but the volume, character or weight of the cargo is of no other concern to plaintiff. The rate is lower if the barge is towed with others in a flotilla which plaintiff schedules for its customers to leave New York Harbor on certain days of the week or to leave Albany, New York, or some other point on the Hudson, on certain other days of the week. The regular service is maintained under contracts to meet the needs of certain customers. Other customers who can wait for their service until the regular flotilla is towed are given the benefit of the lower unit cost. If a customer desires individual service on a certain date, the rate is higher.

While approximately 95% of its services
ing from points of departure in New York
of destination in the same State, most of its
New Jersey waters, as the New York-New Je
follows the middle of the river and because
channel of the river for some seven or ei
west of the boundary line. A small amount,
of plaintiff's towing service is rendered
in New Jersey adjacent to the Hudson Rive
Harbor and points outside the harbor in N

The Commission held that plaintiff w
interstate commerce as "a common carrie
towing vessels in the performance of towa
propelled freight-carrying vessels between
New York Harbor, New York, and New Jer
ford, New York • • • and intermedi
the Hudson River." In making its finding
tiff, pursuant to the Act, is a common carr
held itself out as such, the Commission re
ticular to the testimony of plaintiff's presid
the footnote.[1e]

1e "Q. Within the range of your operation, with c
being favorable, contents of the barges being what yo
be, will you tow for anyone seeking your services?
yes.• • • We don't hold ourselves out at all. As
orders, as I mentioned. I think that 12 or 13 percen
miscellaneous business. People will call up today
want us to take a barge from here to there. We ask
it is and how much it carries, and we give them a pr
job. The rest is all by yearly or regular arrangeme
even down to the naming of the barge that they w
We have some on the blacklist, whom we do not to
that they don't pay. • • •

"Q. But if there is some boat-owner who may take
contract with you—and provided that the vessel as is
the credit arrangement are satisfactory—you will t
fleet? A. Surely—if he gives us an order for it befo

The Commission also pointed out that that san
that in the tows that leave New York nightly for
have practically no limits; we take all that will co
that by 'all that will come' he meant, 'individual
who have made arrangements with us. • • •
order for the barge before the barges leave the stak

Plaintiff began this suit, pursuant to 28 U. S. C. A. §§ 41 (27-28) and 43-48, praying that the Commission be ordered to grant plaintiff's petition to dismiss its application or, in the alternative, that this court direct the Commission to issue to plaintiff a certificate as a contract carrier.[1d] The evidence presented at the hearing before this court consisted solely of the petitions filed before, the testimony presented to, and the opinion, findings and orders of, the Commission.

FRANK, Circuit Judge:

1. Plaintiff contends that, as a tower, it is not a "carrier by water" within the meaning of the Act. We cannot

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testified that arrangements for a particular towing job could be entered into over the telephone, and upon inquiry whether such an arrangement would be entered into with persons with whom he had had no prior dealings, replied: 'We would want to know something about them. If it was out of the blue, we would want to know who he was, and what he had to go, before we would give him a price.' Sometimes prepayment of charges has been required. As to the breadth of applicant's willingness to transport: Witness testified that 'Having been there since 1837, we pretty much know every manufacturer on the river. We go to him and ask him for a contract, and show him what kind of service we can give, and he gives us the contract.' And again, respecting the daily towing schedules: 'The business has been going on for so long that everybody knows it.'"

Division 4 notes the testimony that plaintiff sometimes refused request for services when they could not be rendered without injuring one of the regular customers, saying, "How such injury could result is not explained, and, in view of the evidence that there is practically no limit to the number of barges it can include in a flotilla, the statement is unintelligible." The Commission regarded as immaterial the fact that plaintiff frequently had declined to perform towage unless it was given a release from all liability, including liability for negligence."

The Commission stated: "We find that the evidence discloses the fact of a general holding out tempered by prudence, a desire for business rather than a desire to exclude any. We find as a fact that applicant holds itself out to the public to tow for anyone with ability and willingness to pay for the service. Such a holding out, accompanied by performance, constitutes one a common carrier."

[1d] National Water Carriers Association, Inc., and The Boston Towing Company, having been permitted to intervene in the Commission's proceedings, sought intervention in this suit. Objections to these interventions were made, but were later withdrawn and the interventions were accordingly permitted.

agree. Plaintiff literally "engages in the transportation by water of * * * property * * * for compensation," which is the test under § 302(c) and (d). For the dictionary tells us that, nautically, to transport is "to haul a vessel by hawsers". And a barge is both a "vessel" and "property". Section 302(h) states that transportation "includes the use of any transportation facility" and § 302(g) includes, in the term "transportation facility", "any vessel", in turn, is defined in §302(f) to mean "any watercraft".[1e] Plaintiff, however, argues that § 302(g) also defines "transportation facility" to include "any * * * wharf", and yet the Commission has held that wharfingers are not within the Act;[2] but the Commission so held because the legislative history showed a clear Congressional intent to exclude wharfingers. Finally, and most important, § 303(f) (2) which expressly excludes certain kinds of towage would be meaningless if towage generally were not included; and plaintiff's activities are not within the excluded varieties of towage.

2. Plaintiff argues that even if it be a "carrier by water" within the meaning of the Act, it is not a "common carrier by water". Plaintiff points to decisions in which, before the passage of this Act, persons engaged in activities such as that in which it engages were held not to be common carriers. It is suggested that, accordingly, the constitutional power of Congress to regulate plaintiff as a common carrier is doubtful and that a statute should be so construed as to avoid raising grave doubts as to its constitutionality. But, since *Nebbia* v. *New York*, 291 U. S. 502 and *Olsen* v. *Nebraska*, 313 U. S. 236, there have been no such doubts; for it is now well settled that "there is no closed class or category * * * of businesses affected with a public interest". There is no need to repeat here what was said in *Fordham Bus Corporation* v. *U. S.*, 41 Fed. Supp. 712, 715, where this very question was fully discussed with reference

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[1e] Cf. *Union Stockyards & Transit Co.* v. *U. S.*, 308 U. S. 213, 217.

[2] *Status of Wharfingers*, 215 I. C. C. 633.

to the regulation of motor carriers under Part II of this Act.[3]

We fail to understand plaintiff's contention that, because it was not a common carrier for purposes of liability under the Harter Act or otherwise in Admiralty or at common law, this Act should be construed as not intended to include it as a common carrier; for in § 320(d) [4] Congress showed that it had in mind the difference between the question of liability and that of regulation. By labeling persons such as plaintiff "common carriers" in this Act, they do not become such for all purposes; this is made clear by § 302 which, in so labeling them, expressly states that it does so "for the purposes of this Act." And see *Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 199, 211-212; *United States* v. *Brooklyn Terminal*, 249 U. S. 296, 304; *Liverpool Steam Company* v. *Phenix Insurance Co.*, 129 U. S. 397, 440.

That plaintiff supplies merely the hauling power and has no contractual relations with those who ship their goods on the barges t wed by plaintiff is irrelevant, as appears from decisions as to similar situations with respect to railroad carriers under Part I of this Act.[5]

Plaintiff urges that Congress could not have intended it to be classified as a common carrier under the Act because it was not such before the passage of the Act and because the "grandfather" clause § 309(a), provides that, if a carrier was in operation "as a common carrier by water" on a stated date before the Act was enacted. It is entitled to a "grandfather" certificate. But clearly what Congress meant was that a person is entitled to such a certificate if, on

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[3] Cf. *Alton R. Co.* v. *U. S.*, 315 U. S. 15, 23, which indicated that one who was a "contract carrier" under a state permit can claim "grandfather" rights as a common carrier under Part II of this Act.

[4] §320(d) reads: "Nothing in this part shall be construed to affect any law of navigation, the Admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation or custom not in conflict with the provisions of this Part."

[5] *U. S.* v. *California*, 297 U. S. 175, 182-183; *Union Stock Yard & Transit Co.* v. *U. S.*, 208 U. S. 213, 219; *U. S.* v. *Brooklyn Terminal*, 249 U. S. 296, 305; *Belt Ry. Co.* v. *U. S.*, 168 F. 542, 544; *U. S.* v. *Sioux City Stockyard Co.*, 162 F. 556.

the specified date before the enactment of the legislature, it had been engaged in activities which, after the statute went into effect, would constitute it a common carrier.[6]

There is substantial evidence to sustain the Commission's finding that plaintiff so "holds itself out to the general public" [see § 302(d)] that it is a "common" and not a "contract carrier". The differentiation between a "common" and a "contract" carrier is well explained by Judge McGuire in *Doyle Transfer Co.* v. *U. S.* 45 Fed. Supp. 691[7]; that case, to be sure, related to Part II of the Act, but the definitions of "common" and "contract" carriers in Parts II and III are identical (excepting that in the latter "by water" appears in the place of "by motor vehicle".) See also *Fordham Bus Corporation* v. *U. S.*, 41 Fed. Supp. 712, 717-718.

It goes without saying that, since there is substantial evidence to support the Commission's finding, we must sustain it, whether or not we would have made that finding,[7a] and also that it is not our province to consider the wisdom of the legislation. On the basis of the finding, we hold that the Commission's conclusion and order was not erroneous.

3. Plaintiff argues that, in any event, it is not engaged in transportation, under § 302(i)(I), "wholly by water from a place in a state to a place in another state". Literally, of course, it is, for it transports from a "place" in the waters of New York to a "place" in the waters of New Jersey.

The language of Part I, § 1(I), as to railroads is virtually the same, i.e., "from one state * * * to any other state". That language was construed, many years before

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[6] Note that the "grandfather" clause of Part II, as to motor carriers, § 206(f), is identical in language with § 309(f) and see *Alton R. Co.* v. *U. S.*, 315 U. S. 15, 23; cf *Fordham Bus Corp.* v. *U. S.*, 41 Fed. Supp. 712.

[7] See the legislative history and the Commission decisions there cited and quoted.

[7a] See e. g., *Sperry Gyroscope Co., Inc.*, v. *N. L. R. B.*, 129 F. (2d) 922, 924 (C. C. A. 2) and cases there cited in note 1. That there were dissenting opinions filed by some of the Commissioners is immaterial. Cf. *Virginian Ry.* v. *U. S.*, 272 U. S. 658, 674-675.

the enactment of Part III, to apply to continuous transportation beginning in a state, running through a second state, and returning to the first state. *Missouri Pacific R. R. Co.* v. *Stroud*, 267 U. S. 404; *United States* v. *D. L. & W. R. Co.*, 152 Fed. 269. It is true that this interpretation has been said (152 Fed. at 272) to be strengthened by the fact that §1(2) in Part I provides that jurisdiction over railroads shall not apply "to transportation * * * wholly within one state". But § 303(h) in Part III similarly precludes jurisdiction, as to water carriers, over "intrastate transportation". As the Commission says, if the words "wholly within a state" in Part I fortify the conclusion that it has jurisdiction under Part I over transportation between points in a single state through another state, the language quoted above from § 303(h) fortifies a similar conclusion under Part III.

Plaintiff points to the fact that, in 1935, Congress in § 203(10), Part II, as to interstate motor carriers, conferred jurisdiction by expressly defining "interstate commerce" to mean "commerce between any place in a state and any *place in another state or between places in the same state through another state*".[8]

Plaintiff argues that the omission from the definition of "interstate transporation" in part III of the words we have italicized in this provision in Part II conclusively shows that Congress did not intend to confer such jurisdiction as to water carriers. Had Parts II and III been enacted at the same time, that argument would have been persuasive, but Part III was enacted in 1940, five years after the enactment of Part II. Congress must be deemed to have known in 1940 that the courts had held that the language employed in Part I had precisely the meaning of the language employed in Part II. Congress then had a choice of two methods of expressing the same intention; therefore, no significance can be given to the fact that, when it enacted

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[8] Italics added.

Part III in 1940, it selected the language which it had used in Part II.[9]

Plaintiff places much reliance on *Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549. There this very plaintiff was subject to a tax imposed by a statute of the State of New York, for the privilege of doing business as a corporation, equal to a percentage of the gross earnings on transportation originating and terminating in that State; the statute expressly provided that the tax would not apply to earnings derived from interstate business. The State assessed the tax on earnings from towage between New York ports which passed through New Jersey waters. Plaintiff in that case contended that such traffic was interstate and not constitutionally taxable by the State, but the Supreme Court held otherwise. There is substantially no difference between the way traffic is now handled by plaintiff and the way it was then handled as described in that opinion. Accordingly, plaintiff argues that it has been held that it is not engaged in interstate commerce, and is therefore not subject to the Commission's jurisdiction. In so far as this is a contention that Congress lacks the power constitutionally to regulate plaintiff under the Commerce clause, the contention must fail. Criteria employed in determining whether a state may validly tax because of the Commerce clause are not applicable to a determination whether the federal government may validly regulate under that clause. The *Sohmer* case itself relies upon, and cites, *Lehigh Valley R. R.* v. *Pennsylvania*, 145 U. S. 192, and *Ewing* v. *City of Leavenworth*, 226 U. S. 464, where that distinction is clearly made. See also *Hawley* v. *Kansas City Southern Ry. Co.*, 187 U. S. 617, 621.

Plaintiff also suggests that the Sohmer decision is a finding of fact, conclusive for all purposes, that it is engaged in intrastate commerce. The answer is that the "finding" was there made with reference to the power of the State

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[9] These comments also answer a possible suggestion based upon the definition of "interstate commerce", similar to that used in Part II, in § 402(a) (6) of Part IV, that Part having been enacted in 1942, two years after the enactment of Part III.

to tax. In the instant case, the Commission, after a hearing, has made an express finding that plaintiff is engaged in interstate transportation as that term is defined in Part III.[10]

Pursuant to F. R. C. P. 52, we are filing herewith our findings of fact and our separate conclusions of law; as provided in that Rule, we will entertain a motion by either party that we amend the findings or make additional findings.

Dismissed.

JEROME N. FRANK,
U. S. C. J.
ALFRED C. COXE,
U. S. D. J.
JOHN BRIGHT,
U. S. D. J.

APPENDIX "B".

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Civ. 21-35.

CORNELL STEAMBOAT COMPANY, *Plaintiff*

v.

UNITED STATES OF AMERICA, *Defendant.*

The following are our findings of fact and separate conclusions of law made pursuant to F. R. C. P. 52:

Findings of Fact.

1. Plaintiff filed an application with the Interstate Commerce Commission asking for a certificate as a contract carrier by water under § 309(f) of Part III of the Interstate Commerce Act or for such certificate as it might be entitled

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[10] The Commission urged that we apply the doctrine of such cases as *Gray* v. *Powell*, 314 U. S. 402, 413, as to the weight to be given to administrative interpretations of the statute. We have found it unnecessary to do so. Cf. *Hartford Electric Light Company* v. *F. P. C.*, 131 F. (2d) 953, 966 (C. C. A. 2).

to procure, and, simultaneously, petitioned the Commission to dismiss its application for lack of jurisdiction over plaintiff. A hearing was duly held at which evidence was taken before a Commission Examiner; on exception to the Examiner's proposed report, Division 4 of the Commission, after argument, made findings of fact and an order. On reargument before the full Commission, it approved the findings and order of Division 4 with a slight modification.

2. The Commission found that plaintiff had held itself out as a common carrier by water for compensation, as that term is defined in the Act, in the performance of towage of non-self-propelled vessels "between points within New York Harbor, New York, and New Jersey * * * and Waterford, New York, and intermediate points on the Hudson River," and that it had performed such services on January 1, 1940, and continuously since then.

3. There was substantial evidence before the Commission to sustain those findings.

4. The Commission denied plaintiff's motion to dismiss its application and order that a certificate of convenience and necessity issue to plaintiff as a common carrier by water in accordance with those findings and pursuant to § 309(a) of the Act.

5. The evidence presented to this court on the hearing of this case consisted solely of plaintiff's application and petition before the Commission; the evidence considered by the Commission; a proposed report made by a Commission Examiner who heard the evidence; the opinion, findings and order of Division 4 of the Commission; and the opinion, findings and order of the full Commission.

6. The undisputed evidence is that, while 95% of plaintiff's services here consisted of towing, through the Hudson River, from points of departure in New York State to points of destination in that State, yet most of its tows crossed into New Jersey waters for some seven or eight miles and were obliged to do so because, for that distance, the navigable channel of the Hudson River lies west of the New York-New Jersey boundary line; and that something

less than 5% of plaintiff's business consisted of towing between points in New Jersey adjacent to the Hudson River or New York Harbor and points outside the harbor in New York State.

Conclusions of Law.

1. The findings of fact made by the Commission are not erroneous.

2. Within the meaning of Part III of the Act, plaintiff is engaged in transportation "wholly by water from a place in a state to a place in another state."

3. The order of the Commission is supported by its findings and is not erroneous.

4. The statute, so far as made applicable to the plaintiff by the order of the Commission, is not violative of any part of the Constitution of the United States.

JEROME N. FRANK,
U. S. C. J.
ALFRED C. COXE,
U. S. D. J.
JOHN BRIGHT,
U. S. D. J.

Dated: New York, N. Y.
July 7, 1943.

APPENDIX C.

INTERSTATE COMMERCE COMMISSION.

No. W-359.

CORNELL STEAMBOAT COMPANY—CONTRACT CARRIER APPLICATION.

Submitted October 21, 1942. Decided February 2, 1943.

Upon reargument, findings in prior report, 250 I. C. C. 301, that applicant is entitled to continue operation as a common carrier by water by towing vessels in the performance of towage of non-self-propelled freight-carrying vessels, loaded or light, within the limits of New York Harbor, N. Y. and N. J., on the Hudson River between New York Harbor and Waterford, N. Y., and all intermediate points, by reason of having been engaged in such operation on January 1, 1940, and continuously since, and that applicant's petition for dismissal of its application should be denied, modified. Corrected certificate issued.

Appearances as in prior report, and *Christopher E. Heckman* for intervener.

REPORT OF THE COMMISSION ON REARGUMENT.

BY THE COMMISSION:

In the prior report, 250 I. C. C. 301, division 4 found that applicant was entitled to continue operation as a common carrier by water of non-self-propelled freight-carrying vessels by means of towing vessels within the limits of New York Harbor, N. Y. and N. J., and on the Hudson River between New York Harbor and Waterford, N. Y., and all intermediate points, by reason of having been engaged in such operation on January 1, 1940, and continuously since, and it issued a certificate of public convenience and necessity. The application was in form a petition for a permit under the provisions of section 309(f) of the Interstate Commerce Act authorizing continuance of opera-

tion as a contract carrier by water, but it further prayed that if the facts show that applicant, although applying for a permit, is entitled to a certificate, the application be considered as one of the appropriate form of authority. The application was filed without prejudice to applicant's contention that in its performance of towage services for hire it is not a carrier and does not carry or transport any passengers or property, and that it is not subject to the act. On the same date applicant filed a petition to dismiss its application on the ground that, in the performance of its business of furnishing towage services, it does not engage in or perform or furnish any transportation of passengers or property within the language and intent of the provisions of part III of the act, and therefore is not subject to and does not come under the regulations of the act. Without prejudice to its request for dismissal upon those grounds, applicant further prayed that it be held exempt from and not subject to regulation insofar as its towage services are furnished wholly intrastate, to, from, and between points within the State of New York, irrespective of whether or not the vessels to which the towage services are so rendered are engagd in, or any cargoes or property on board those vessels are moving in, interstate commerce. Division 4 denied this petition. Upon petition of applicant, we reopened the proceeding for reargument, and postponed the effective date of the certificate and order to March 24, 1943. At the reargument applicant filed a supplemental brief. The facts are fully set forth in the prior report, and will be repeated here only to the extent necessary to an understanding of the matters herein discussed.

The same three questions are presented on the reargument as in the prior report: (a) Are towers to be regulated as carriers under part III of the act? (b) Is transportation by water between two ports in a single State but passing through the waters of another state, within the jurisdiction conferred on this Commission by part III of the act? And (c) is applicant a contract carrier or a common carrier? These will be considered in the order stated.

Briefly stated, applicant's main contention is that towers who furnish towage services without assuming contractual obligations and liabilities as to the cargoes upon the

vessels towed have for years been held by the courts not to be common carriers; and that therefore when Congress undertook by part III of the Interstate Commerce Act to regulate common carriers by water it must not be understood to have undertaken to regulate such towers. It is pointed out that under this form of towage the barge owners retain possession and custody of the merchandise upon the barges, through their barge captains who accompany the barges.

Each of the cases in the line of court decisions relied upon involved a defense under section 3 of the Harter Act (46 U. S. C. 192), which provides:

> If the owner of any vessel transporting merchandise or property to or from any port in the United States of America, shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel.

Division 4 discussed representative cases. It is sufficient here to say that in those instances where the contract was for towage only of the loaded vessel, the court held that nothing in the agreement could be regarded as making the vessel or her cargo the cargo of the tug so as to make available to the tug owner the defense provided by the Harter Act. But where the contract was to transfer merchandise by means of the barges and tugs of the tug owner, there was a contract of affreightment, the tug and barge became, for the purposes of the voyage, one vessel, and the defense provided by the Harter Act was available to the tug owner. After discussing these cases, the division said:

> • • • Relating, as they do, to loss and damage, we do not accept them as determinative of the status of towers under part III of the act, which specifically provides in section 320(d) that:
>
> Nothing in this part shall be construed to affect any law of navigation, the admiralty jurisdiction of

> the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this part.
>
> In view of section 320(d), we consider that a finding that towers are carriers within the contemplation of part II would not affect their liability for loss or damage. Therefore the foregoing decisions may not be construed as a bar to the regulation of towers under part III.

Division 4 also discussed at length applicant's numerous contentions, the facts, and the law respecting the definition of a common carrier by water under part III, what constitutes carriage or transportation under that part, the various paragraphs of the Interstate Commerce Act which might throw light on the intention of Congress with respect to the question here under consideration, and the broad purposes of part III. In fact, every contention raised by applicant on reargument and in its supplemental brief as to whether or not towers are brought within the scope of part III was fully discussed in the prior report. We concur in the conclusions of the division for the reasons set forth by it at length, and it would serve no useful purpose to repeat that reasoning herein. The finding that towers engaged in interstate towing for the general public are subject to part III of the act, except to the extent that specific exemptions are provided, is affirmed.

Coming next to the question of whether transportation by water between two points in the same State, but passing through another State enroute, is within the jurisdiction conferred on this Commission by part III of the act: Division 4 discussed the various provisions of the act bearing upon this question, and illustrated the incongruous results that would follow the acceptance of applicant's contention that transportation of the character here considered is not made subject to our jurisdiction under part III.

In support of its contention that transportation between two ports in New York, but passing enroute through New

Jersey, is not interstate commerce within the jurisdiction conferred on this Commission by part III of the act, applicant relies upon *Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549. That case involved a statute of the State of New York imposing a tax upon transportation corporations for the privilege of carrying on business in a corporate capacity within the State, equal to five-tenths of 1 percent of the gross earnings on transportation originating and terminating in the State of New York. The statute expressly provided that the tax would not apply on earnings derived from interstate business. The State assessed the tax on earnings from transportation between New York ports but which passed through New Jersey waters, which traffic this applicant there contended was interstate and so not taxable by the State of New York. It was stated by applicant's counsel at the reargument herein that there is substantially no difference in the way the traffic is handled now and the way it was handled then as described in that opinion; and the facts of record, recited in the report of division 4, tend to support that conclusion. The traffic was described in the opinion of the Court in the following language:

> Tows for up-river points on the Hudson River are made up at a stakeboat located at Weehawken, within the territorial limits of the State of New Jersey; that there are two stakeboats anchored in the river just below Weehawken ferry; that vessels and boats reported for the up-river tows are taken out to the stakeboats and there made fast, and the tow is there made up, the towing vessels are attached, and the course pursued by the steamers in going up the river is in the territory of New York and New Jersey; that tows coming down the river pursue a like course, going into the territory of both States, and when the tow arrives in New York harbor, the entire tow, or the greater part thereof, is, as a usual thing, turned in the river, going into the territory of New Jersey and making the turn. Deponent further says that nearly all earnings of the company are from business done within the territorial limits of New York and New Jersey, to such extent as the State of New Jersey is

> included in the Hudson River and New York Bay, and that it is absolutely impossible to state just when the vessels are within the territorial limits of either State.

The court held that the tax was not a charge upon the navigation of the river, but was upon the doing of business as a corporation of the State within the State. In the course of its opinion the court said:

> Transportation between the ports of the State is not interstate commerce, excluded from the taxing power of the State, because as to a part of the journey the course is over the territory of another State. *Lehigh Valley Railroad* v. *Pennsylvania*, 145 U. S. 192; *Ewing* v. *City of Leavenworth*, 226 U. S. 464.
>
> * * *
>
> We are of the opinion that commerce thus carried on is not interstate commerce, beyond the taxing power of the State, and that the return on which the tax was assessed did not involve the revenues of commerce among the States.

It will be seen that the court indicated that it was following *Ewing* v. *Leavenworth*, 226 U. S. 464. That case involved the constitutionality of a license tax on express companies for receiving and sending packages between points within the State of Kansas, levied by the city of Leavenworth, Kans. The route of the express company from Leavenworth passed over into the State of Missouri, and thence back into Kansas. The contention was therefore made that the tax was a regulation of and burden upon interstate commerce. The court said that the case was controlled by *Lehigh Valley Railroad* v. *Pennsylvania*, 145 U. S. 192, and distinguished the taxing power from the power of regulation of transportation. We quote:

> It is contended, however, that the contrary result must be reached, applying the principles laid down in *Hanley* v. *Kansas City Southern Ry. Co.*, 187 U. S. 617. In that case this court declared unconstitutional a law of Arkansas undertaking to fix rates upon rail-

way transportation, the transportation in question in that case being a single carriage partly outside of the State of Arkansas from a point within to another point within the State. In the particular instance the transportation covered 116 miles, of which only 52 miles were within Arkansas and the rest without the State. It was held that the right to regulate such commerce was solely in Congress under the Constitution, and that the transportation was a single and entire thing and as a subject for rate legislation was indivisible. The case of *Lehigh Valley Railroad* v. *Pennsylvania, supra,* was called to the attention of the court, and of that case this court said (p. 621):

"That was the case of a tax and was distinguished expressly from an attempt by a State directly to regulate the transportation while outside its borders. 145 U. S. 204. And although it was intimated that, for the purposes before the court, to some extent commerce by transportation might have its character fixed by the relation between the two ends of the transit, *the intimation was carefully confined to those purposes.* Moreover, the tax 'was determined in respect of receipts for the proportion of the transportation within the State.' 145 U. S. 201. *Such a proportioned tax had been sustained in the case of commerce admitted to be interstate. Maine* v. *Grand Trunk Railway Co.,* 142 U. S. 217. Whereas it is decided, as we have said, that when a rate is established, it must be established as a whole."

The distinction is applicable here. There is no attempt to fix a rate by the authority of the State, which, while single and complete in itself, covers for a considerable part interstate transportation. The privilege tax levied in this case expressly excludes commerce of an interstate character or business done for the Government, and is levied solely on the business done in the City of Leavenworth in receiving packages from points within the State and in transporting packages to like points. Applying the principles of the *Lehigh Valley Case* to such a situation

> we are of opinion that, *for the purpose of a privilege tax for business thus done*, the municipality, acting under authority of the State, did not exceed its just power. (Emphasis added.)

We conclude that the right of the State of New York to impose a franchise tax based in part upon revenues from business between two ports of that State but which passes through the State of New Jersey, is clearly distinguished from, and constitutes no bar to, the exercise of jurisdiction by this Commission to regulate such interstate transportation.

At the reargument, and in its supplemental brief filed at that time, applicant, while admitting that the geographical boundary between New Jersey and New York follows the middle of the river (4 Stat. L. 708), urges that the State of New York has jurisdiction over the waters of the Hudson River lying west of Manhattan Island to the low-water mark on the New Jersey shore, under an agreement entered into by the two States in 1833. That agreement was ratified by the legislatures of the two States and approved by Congress. It fixes the boundary at the middle of the river and bay, but grants to the State of New York exclusive jurisdiction over all the waters of the Bay of New York and of the Hudson River lying west of Manhattan Island and to the south of the mouth of Spuyten Duyvil Creek to low-water mark on the New Jersey side thereof, subject to certain specified rights of property and of jurisdiction of the State of New Jersey, one of which is the exclusive right of property in and to land under the water lying west of the middle of the bay and river; a second is that the State of New Jersey shall have exclusive jurisdiction over wharves, docks, and improvements on the shore of that State, and over all vessels aground or fastened to any wharf or dock on that shore, except that said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers of the State of New York; and another is the regulating of fisheries west of the middle of said waters. This agreement is referred to, and its provisions are set forth in *The People* v. *Central R. Co. of N. J.*,

42 N. Y. 283. The court there, referring to the second exception, said:

> This exception explains the object and nature of the jurisdiction intended to be given to New York. It was to be a police jurisdiction of and over all vessels, ships, boats or craft of every kind that did or might float upon the surface of said waters, and over all the elements and agents or instruments of commerce, while the same were afloat in or upon the waters of said bay and river for quarantine and health purposes, and to secure the observance of all the rules and regulations for the protection of passengers and property, and all fit governmental control designed to secure the interests of trade and commerce in said port of New York, and preserve thereupon the public peace.

Respecting the asserted jurisdiction of the State of New York to decide what is an obstruction upon those waters, the court said:

> The jurisdiction asserted for this State really belongs to the general government. In the case of the *State of Pennsylvania* v. *The Wheeling Bridge Company and others* (13 How. U. S. 579) Chief Justice Taney said: "The Ohio being a public navigable stream, congress has undoubtedly the power to regulate commerce upon it."

From the north end of Manhattan Island northward to the point where the northern boundary of New Jersey reaches the Hudson River is some 7 or 8 miles. Applicant therefore asserts that only for this distance would its traffic be outside the waters that are under the jurisdiction of the State of New York. It is not necessary for us to pass upon the question of whether the movement of applicant's traffic through the waters of the western half of the Hudson River lying west of Manhattan Island constitutes it interstate commerce, although this applicant in *Cornell Steamboat Co.* v. *Sohmer, supra,* contended that it was such, since concededly movement through the waters of the western half of

the river north of Manhattan Island is through waters under the jurisdiction of the State of New Jersey. The interstate character of applicant's traffic is determined, not by the number of miles that it moves outside the State of New York, but by the fact that it *does* move outside the State.

The finding and certificate of division 4 embrace transportation within the limits of New York Harbor. It is clear that as to towage performed by applicant wholly within New York Harbor applicant is not a party to any arrangement for the through carriage of such barges or the cargoes therein from or to points without the State. In section 303(g) of the act it is provided that the provisions of part III shall not apply to transportation in interstate commerce by water solely within the limits of a single harbor or between places in contiguous harbors, when such transportation is not part of a continuous through movement under a common control, management, or arrangement to or from a place without the limits of any such harbor or harbors. Applicant therefore requires no certificate for such transportation as it performs entirely within New York Harbor, and the certificate will be corrected accordingly.

We affirm the conclusion of division 4 that transportation between two points in the State of New York, passing through New Jersey territorial waters en route, is within the jurisdiction conferred on this Commission by part III of the act.

Coming finally to the question of whether applicant is a contract carrier or a common carrier: Division 4 recited at length the facts bearing upon this question, even going to the length of quoting some of the testimony. The evidence, as recited by the division, warrants the ultimate finding of fact that applicant holds itself out to the public to tow for anyone with ability and willingness to pay for the service, and the conclusion that such a holding out, accompanied by performance, constitutes one a common carrier.

The division set forth six numbered paragraphs of findings of fact, which we find to be fully supported by the evidence. We adopt those findings as our own and they

are by reference made a part of this report. Upon those facts we affirm the conclusion of the division that applicant was in bona fide operation on January 1, 1940, in interstate commerce as a common carrier by towing vessels in the performance of towage of non-self-propelled freight-carrying vessels, loaded or light, between points within New York Harbor, N. Y. and N. J., as that harbor is defined in our order of March 26, 1941, entered in Ex Parte No. 140, and Waterford, N. Y., and intermediate points on the Hudson River; that such operation has been continued since that date; and that applicant is entitled under the "grandfather" clause of section 309(a) of the act to a certificate of public convenience and necessity authorizing continuance of such operation, subject, however, to general conditions which are necessary to carry out, with respect to continuation of applicant's operations, the requirements of part III of the act, and the orders, rules, and regulations of the Commission thereunder.

We further affirm the division's denial of applicant's petition to dismiss the application.

A corrected certificate and order will be issued.

JOHNSON, *Commissioner*, concurring in part:

Generally speaking, the Hudson River forms the boundary between New York and New Jersey. The geographical boundary follows the middle of the river, but under an agreement entered into between the two States New York is granted police jurisdiction to the low-water mark on the New Jersey side. Tows for up-river points on the Hudson River are made up at a stakeboat located at Weehawken, within the territorial limits of the State of New Jersey, but such tows originate in New York and are destined to points in New York; they merely pass through the territorial waters of New Jersey. With respect to the transportation performed by this applicant, the Supreme Court has held that "Transportation between the ports of the State is not interstate commerce, excluded from the taxing power of the State, because as to a part of the journey the course is over the territory of another State." *Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549. For commercial

purposes the entire river may be considered the boundary line between the two States. I am, therefore, of the opinion that the transportation here involved is not interstate for the purposes of regulation under the Water Carrier Act.

I am authorized to state that COMMISSIONER LEE joins in this expression.

SPLAWN, *Commissioner*, dissenting:

Applicant has been engaged in the towage business for many years, operating between points in New York and New Jersey within New York Harbor and between New York and points on the Hudson River. Applicant enters into individual contracts in connection with each towage operation. Its charges depend upon the weight of the tow and also whether other ships are towed at the same time. The charges have no relation to the lading on the towed ship and applicant undertakes no responsibility with respect to loss or damage of the towed ship or cargo. Applicant does not hold itself out to transport any commodities or property, but is willing to enter into contracts with any person or persons desiring its services within the area of its operations.

Although it has filed this application for authority under part III of the Interstate Commerce Act, applicant denies that we have jurisdiction over its operations. It is conceded that applicant's towboats constitute transportation facilities within the meaning of section 302(h) of part III, but it is denied that applicant is a common carrier by water within the meaning of section 302(d). We have found only carriers by water are subject to regulation under part III even though transportation facilities may be furnished by other persons. See *Status of Wharfingers*, 251 I. C. C. 613.

Prior to the enactment of part III, the common law was to the effect that companies engaged in the business of towage were not carriers or charged with the liabilities or entitled to the benefits of laws pertaining to carriers. The reason was that such companies did not enter into contracts of affreightment, but merely agreed to perform

specific towage operations. Where, however, the tower also controlled the towed ship containing the lading and entered into contracts with respect thereto, the two ships, one furnishing the motive power, the other the support for the lading, constituted a vessel within the meaning of the Harter Act, relieving carriers from liability for loss or damage when proper equipment had been furnished. *Sacramento Navigation Co.* v. *Salz*, 273 U. S. 326, 331. The protection of this statute ran to "any vessel transporting merchandise or property" and the tug and barge combined were held to constitute such a vessel. The findings in the report do not bring applicant within this special class of towers controlling the towed ships.

Another exception is illustrated by operators of towboats towing logs in Puget Sound and adjacent waters. In *Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 207, 211, it was held, "In all essential particulars, that service is like the carriage of freight in vessels." With these exceptions, the law has not regarded operators of towboats to be carriers.

There is nothing in part III to support the conclusion that Congress intended to change the common law with respect to towboats. The only reference to towage is in section 303(f) which exempts any towage performed for carriers and requires that regulation be through the respective rail, motor, or water carrier, as the case may be. This provision furnishes no basis for the conclusion that Congress intended that towboats, as such, not engaging in the transportation of commodities or entering into contracts of affreightment, should be held to be carriers subject to regulation. The undertaking of applicant herein is to render specific services and not to transport goods or property. In the absence of any clear language in the statute declaring towboats to be carriers, and the doubtful constitutionality of such a declaration or construction, I would find that the common law rule still prevails, and that ordinary towage, such as performed by applicant, is not transportation or carriage, subject to part III.

Likewise it seems to me that applicant is not subject to regulation under part III because it is not engaged in interstate commerce as defined therein. It is conceded that its

operations within New York Harbor are exempt under our order of March 26, 1941, in Ex Parte No. 140. The only color of jurisdiction lies in the fact that the transportation between points in New York at times probably crosses the thread of the stream and is thus within the jurisdiction of the State of New Jersey. Section 302(i)(1) defines interstate transportation for the purposes of part III as being "wholly by water from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States." Under this definition transportation between two points in the State of Washington would not be in interstate commerce if the vessel had to pass through Canadian waters. No reason appears for giving any broader construction to this section if the vessel happens to pass through the waters of any other State.

The conclusion in the report rests almost entirely upon the alleged similarity with the provisions of part I. This analogy is unsound because the exact routes of water carriers are indefinite as compared with railroads, particularly where the waterway constitutes a boundary, and because part I was not the result of a single enactment but rather the consequence of many statutes and much interpretation. In the enactment of parts II and IV, the Congress for the purposes of those parts, has specifically included within the definition of interstate commerce, transportation between points within the same State through another State. The failure to include a similar provision in part III can mean only that Congress intentionally limited jurisdiction to transportation between points in different States. This construction is also consistent with the fact that part III contains numerous exceptions and exemptions which are evidence of the Congressional intent to confer more limited jurisdiction than has been given in the other parts of the act.

For the reasons given above, I think that the application should be dismissed for lack of jurisdiction.

PATTERSON, *Commissioner*, dissenting:

The majority finds that applicant, when towing non-self-propelled freight-carrying vessels for the general public,

is a common carrier of said vessels. Many of these vessels are loaded but there is no finding that applicant is a common carrier of the commodities with which they are loaded. The theory of the majority appears to be that there is a relation of common carrier and shipper so far as the vessels are concerned, but not as to the cargo on the vessels. Under the finding applicant will have to publish rates for towing vessels but not rates for the transportation of the numerous commodities on the vessels. A vessel, like a freight car, is a facility used to transport goods. It seems to me anomalous to hold that one is a common carrier of the facility and not to find that it is a common carrier of the goods therein.

It seems clear that prior to the enactment of part III of the act, an independent tower operating as does applicant was not considered a carrier under the law. Applicant's tugs are merely motive power used for the same purpose as horses or tractors might be used, and nothing more. Whether the motive power is attached to the vessel or operated as a separate unit is immaterial. I believe that Congress did not intend to and did not bring such towers under our jurisdiction. I also believe that if applicant were a common carrier under part III, it would be a common carrier of the goods on the vessels which it tows.

APPENDIX "D".

Certificate and Order.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 2nd day of February, A. D. 1943.

No. W-359.

Cornell Steamboat Company—Contract Carrier Application

It appearing, That on June 15, 1942, division 4 made and filed its report and issued its certificate and order in the above-entitled proceeding, and that on August 10, 1942,

the Commission, by appropriate order, reopened this proceeding for reargument;

It further appearing, That this proceeding has been reargued, and that the Commission, on the date hereof, has made and filed its report on reargument containing its further findings of fact and conclusions thereon, which said report on reargument and the aforesaid report of June 15, 1942, are hereby referred to and made parts hereof:

It is hereby certified, That the public convenience and necessity require the continuance of operation by Cornell Steamboat Company as a common carrier by water by towing vessels in the performance of towage of non-self-propelled freight-carrying vessels, loaded or light, in interstate or foreign commerce, between points within New York Harbor, N. Y. and N. J., as that harbor is defined in our order of March 26, 1941, in Ex Parte No. 140, and Waterford, N. Y., and intermediate points on the Hudson River.

It is ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.

It is further ordered, That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act, and the orders, rules, and regulations of the Commission thereunder.

It is further ordered, That the petition of applicant to dismiss the application be, and it is hereby, denied.

It is further ordered, That the aforesaid certificate and order of June 15, 1942, as subsequently postponed, to March 24, 1943, be, and it is hereby, vacated and set aside.

And it is further ordered, That this certificate and order, dated February 2, 1943, shall take effect and be in force from and after May 11, 1943.

By the Commission.

[SEAL.]

W. P. BARTEL,
Secretary.

APPENDIX "E".

INTERSTATE COMMERCE COMMISSION.

No. W-359.

CORNELL STEAMBOAT COMPANY—CONTRACT CARRIER APPLICATION.

Submitted March 12, 1942. Decided June 15, 1942.

1. Applicant found entitled to continue operation as a common carrier by water of non-self propelled freight-carrying vessels by means of towing vessels within the limits of New York Harbor, N. Y. and N. J., and on the Hudson River between New York Harbor and Waterford, N. Y., and all intermediate points, by reason of having been engaged in such operation on January 1, 1940, and continuously since. Certificate of public convenience and necessity issued.

2. Applicant's petition to dismiss its application denied.

Robert S. Erskine, for applicant.

Stanley Carpenter, Reginald G. Narello, James A. Martin, Maurice A. Krisel, Richard H. Specker, Harry C. Ames, Alfred S. Knowlton and *Seymour P. Egerton* for intervenors.

Report of the Commission.

DIVISION 4, COMMISSIONERS PORTER, MAHAFFIE AND MILLER

BY DIVISION 4:

Exceptions to the report proposed by the examiner were filed by applicant and certain of the intervenors, and the issues were orally argued. Our conclusions differ from those recommended by the examiner.

By application filed May 21, 1941, Cornell Steamboat Company, a New York corporation, with its principal office at Kingston, N. Y., seeks a permit under the provisions of section 309(f) of the Interstate Commerce Act authorizing

continuance of operation as a contract carrier by water in interstate or foreign commerce, in furnishing under individual contracts or agreements the services of its fleet of tugboats in towing barges, scows, and similar vessels carrying cargoes either below or on deck, from and to all points on the Hudson River between Waterford, N. Y., and New York, N. Y., harbor points located in New York or New Jersey on the waters of the lower Hudson, and the adjacent waters of New York Harbor. The petition further prays that if the facts show that applicant, although applying for a permit, is entitled to a certificate, the application be considered one for the appropriate form of authority. The application was filed without prejudice to applicant's contention that in its performance of towage services for hire it is not a carrier and does not carry or transport any passengers or property, and that it is not subject to the act.

On May 21, 1941, applicant filed a petition to dismiss its application on the grounds that, in the performance of its business of furnishing towage services as above described, it does not engage in or perform or furnish any transportation of passengers or property within the language and intent of the provisions of part III of the act, and, therefore, is not subject to and does not come under the regulations of the act. Without prejudice to its request for dismissal on those grounds, applicant further prays that it be held exempt from and not subject to regulation insofar as its towage services are furnished wholly intrastate to and from and between points within the State of New York, irrespective of whether or not the vessels to which the towage services are so rendered are engaged in, or any cargoes or property on board those vessels are moving in, interstate commerce.

Rail carriers in official territory and the Northeastern Inland Waterways Association, Incorporated, intervened at the hearing, but introduced no evidence. The Atlantic Coastwise and Inland Water Carriers Association, Incorporated, and Mississippi Valley Barge Line Company were permitted to intervene for the purpose of filing exceptions, and the Boston Towboat Company for the purpose of participating in oral argument. Most of the interveners con-

tend that applicant should be regulated as a common carrier, although differing as to whether services rendered other water carriers should be exempt from regulation.

Applicant was incorporated in 1878 to continue the towing business started in 1837 by the grandfather of its president, who has held that position for the past 29 years. From its inception the business of the applicant has been and still is completely owned by succeeding generations of the same family. At the time of the hearing applicant owned and operated a fleet of upwards of 33 tugboats of undisclosed power and size, some of which are powered by steam and others by diesel engines. One scow is maintained in connection with its regular equipment, but applicant does not own or operate any barges or other type of carrying craft. No cargoes of merchandise or passengers are carried on any of the tugboats. The tugboats are used exclusively in towing for applicant's customers, over 70 percent of whom are shippers who own or operate the scows or barges used in carrying their own merchandise. Other customers are water carriers.

Applicant renders towing services the year around within the limits of New York Harbor, and harbors contiguous thereto, as those limits were defined by us in our order of March 26, 1941, entered in Ex Parte No. 140. It also renders towing services on the Hudson River up as far as Waterford, N. Y., above Troy, N. Y., and the entrance to the Erie Canal, but those operations are suspended during the season when ice prevents them, which is generally from the early part of December to about the middle of March.

Applicant has on file with the Commission its schedule I. C. C. No. 2, containing its minimum rates and charges for the performance, as a contract tower, or only such towage services as it may see fit to undertake under private contract on the Hudson River between Troy, N. Y., and New York Harbor, and intermediate points.

Applicant's records for the year 1940, which it considers fairly representative of its annual business for the past 10 years, shows that only 4.4 percent of its towing services were rendered between points in New Jersey adjacent to the lower Hudson River and points outside the harbor in New York State. However, much of the transportation between

up-river points and harbor points in New York must be interstate commerce, as the New York-New Jersey boundary follows the middle of the river, 4 Stat. L. 708, and would be crossed in the ordinary course of navigating large flotillas of barges up or down the river.

By far the largest part of applicant's business is done on time contracts entered into for a period of years, while some contracts run for a single year, and the balance consists of miscellaneous contracts arranged from day to day. From 12 to 13 percent of its business is of the latter type. Arrangements for all of its towing services, whether for a period of time or for an individual operation, are based on separate agreements or contracts. The vessels towed are scows which carry their cargoes on deck and barges which carry the cargoes below deck in the hold. Under the form of contract used, the shipper does not agree to make shipments; but if it does make shipments, it agrees to employ the towage services of applicant, and to pay therefor at the rates stated in the contract, which are based upon the capacities of the barges described therein. If reductions are made by applicant in the rates charged other shippers for like service, the contract rates are to be reduced to the same level; and if applicant's fuel or labor costs are increased due to strikes or other causes beyond applicant's control, the contract charges are to be increased provided the increases are also made effective as to other customers for similar services. Barges are not deemed to be in applicant's custody or under its responsibility while lying at docks or not being actually towed. The term of the contract is stated, and provision is made for its continuance from year to year if not canceled at the end of the year. Such a contract, prior to the requirement of law for the publication of tariffs, served the same purpose as a common carrier published tariff, which fixes rates and conditions for future acceptance. In addition it reserved to applicant the sole right to tow such traffic covered by the contract as the shipper might decide to move by barge.

The charges for towing services have no relation to, and no connection with, the freight charges paid by the owners of the cargoes for their transportation. Applicant's only interest in a cargo is with respect to the size

of the scow or barge on which it is loaded, and the weight of the cargo which controls the load-water draft of the barge. Rates charged for towing are lower for the larger units. For example, the rate per ton for towing a barge with a minimum of 1,500 tons is less than the rate per ton for a 300-ton-minimum barge. The rate is also lower if the scow or barge is towed with others in a flotilla. Applicant maintains a schedule for its customers under which a tow leaves New York Harbor daily for points as far north as Poughkeepsie, N. Y., and every other day for Albany, N. Y., and other points on the upper Hudson. This regular service is maintained under contract to meet the needs of certain customers. Other customers who can wait for their service until the regular flotilla is towed are given the benefit of the lower unit cost. In flotilla towing the rates are the same to all customers for equal tonnages. If a customer desires individual service the rate is necessarily higher. From 85 to 90 percent of applicant's business is in those flotillas. The flotilla may consist of from 5 to 50 barges. Applicant has practically no limit on such flotillas, but takes all that is offered and adds such additional tugs as may be required.

No holding out of any offer of towing services is advertised by applicant in any daily papers or trade journals. Its witness thought that a simple announcement of towing services had been carried in Bullinger's Guide for many years. An examination of the 1939, 1940 and 1941 editions of that guide fails to disclose such an announcement. Its business has been built up with individual customers over the many years of its operation, and, as the witness said, "The business has been going on for so long that everybody knows it". Applicant has at times refused requests for towing services for various reasons, among which are the condition of the property to be towed, unsatisfactory credit, and when the requested service could not be rendered without injuring one of the regular customers. How such injury could result is not explained, and, in view of the evidence that there is practically no limit to the number of barges it can include in a flotilla, the statement is unintelligible. It also frequently declines to perform tow-

age unless it is given a release from all liability, including liability for negligence.

Applicant does not issue bills of lading or similar documents with respect to the cargoes on the scows or barges towed. Each scow or barge has its own captain who looks after the safety of the vessel and its cargo. Neither the captain of the tugboat nor any other employee of applicant has anything to do with the cargoes on the vessels in the tow. Applicant generally has no interest in and no "official knowledge" of the origin or final destination of the cargoes, and when the towing service is complete with the docking of the vessel at the place agreed upon, no further services are rendered. No arrangements for any through movement, of which the towing services might be a part, are ever entered into by applicant with any other carrier. Applicant claims a lien on the barges towed for its towing charges, but no lien on the cargoes. When the barge is a chartered one, applicant relies on the credit of the charterer.

Are Towers to Be Regulated as Carriers?

The first and fundamental issue raised is whether persons engaged, as is the applicant, only in towing for others by non-carrying vessels are to be regulated as carriers under part III of the act.

In its brief applicant contends that its petition should be granted and its application should be dismissed, for the following reasons:

> The petitioner is not a carrier, and is not "engaged in the business of a contract carrier by water."
>
> No authority is vested in the Commission by part III of the act, and more particularly section 309(f) to issue a permit to, or to require that a permit be held by, any person who is *not* "engaged in the business of a contract carrier by water."
>
> The legislative history of the act and the language of the act itself indicate plainly that Congress did not include towers, such as the petitioner, in the cate-

gory of the water *carriers* which Congress intended to regulate.

In the absence of any specified provision of the act to bring towers, such as the petitioner, within the category of water *carriers*, it can not be assumed that Congress intended to change the long established law of the land that such a tower is not a carrier, or that Congress intended to include such a tower when it authorized the Commission to regulate *carriers* by water.

In support of its contention that it is not a carrier, applicant relies upon the following court decisions and the statements therein which are first set forth. This is followed by our own comments.

In *Stevens* v. *The White City*, 285 U. S. 195, 200, the court said that under a towage contract the tug is not a bailee of the vessel in tow or its cargo; that it does not have such control of the tow as belongs to common carriers and other bailees; that the vessel in tow, its cargo and crew, remain under the authority of its master, and in emergency the duty is on him to determine what shall be done for the safety of his vessel and her cargo; and that a contract merely for towage does not require or contemplate such a delivery as is ordinarily deemed essential to bailment. This case was an action for damages against a tug for injury to her tow.

In *Wells* v. *The Steam Navigation Co.*, 2 N. Y. 204, 208, the court said that it was a misnomer to call defendants common carriers, or carriers of any kind in relation to the business of towing boats; nor were they bailees, for the property towed is not delivered to them, nor placed within their respective custody or control, but remains in the possession, and for most purposes in the exclusive care of the owners or their servants. This, too, was an action for damages against a steamboat for injury to her tow. The court held that the tower might lawfully contract for a more restricted liability than would be implied against it in the absence of a special contract.

Distinguishing its decision in *Sacramento Nav. Co.* v. *Salz*, 273 U. S. 326, 331, from two earlier cases, the court

said therein, "The most important of these differences is that in both cases it was held that contracts of towage and not of affreightment were involved." After referring thereto, applicant goes on to say that section 3 of the Harter Act (46 U. S. C., Sec. 192) gave certain defenses on certain conditions to the owner of "any vessel transporting merchandise or property"; and such defenses were not available to tug owners in performing contracts of towage because their tugs were not transporting or carrying anything. In that case the owner of a barge and a steamer used to tow the barge issued a bill of lading for a cargo loaded on the barge, and through negligence of the towing steamer the barge was sunk and the cargo lost. The sole issue was whether the barge alone or the combination of tug and barge was the "vessel transporting" the cargo, within the meaning of the Harter Act. The Court held that in such case the barge and tug together constitute the vessel transporting merchandise or property within the meaning of that act. The Court there said:

> Considering the language of the bill of lading in the light of all the circumstances, it is manifest that we are dealing with a single contract and the use of the tug must be read into that contract as an indispensable factor in the performance of its obligations. To transport means to convey or carry from one place to another; and a transportation contract for the barge without the tug would have been futile as a contract for the use of freight car without a locomotive. In this view, by the terms of the contract of affreightment, in part expressed and in part necessarily resulting from that which was expressed the transportation of the goods was called for not by the barge, an inert thing, but by the barge and tug, constituting together the effective instrumentality to that end.
>
> It is said that the Harter Act is to be strictly construed. *The Main* v. *William*, 152 U. S. 122, 132. Even so, the rule of strict construction is not violated by permitting the words of a statute to have their full meaning, or the more extended of two mean-

ings. The words are not to be bent one way or the other, but to be taken in the sense which will best manifest the legislative intent. * * *

In *The Columbia, supra,* 73 Fed. 226, it was held that a barge having no motive power and a tug belonging to the same owner and furnishing the motive power constituted one vessel for the purposes of the voyage. In that case, wheat was to be transported by means of the barge, and the owner of the barge and tug undertook the transportation. The court said (p. 237): "As the wheat was to be carried on board the barge, which had no motive power, of necessity such power had to be supplied by the carrier. * * * When the tug made fast and took in tow the barge, to perform the contract of carriage, the two became one vessel for the purpose of that voyage,—as much so as if she had been taken bodily on board the tug, instead of being made fast thereto by means of lines." It was, accordingly, held that without surrendering both vessels, the owner was not entitled to the advantages of Revised Statutes Sec. 4283 *et seq.,* providing for a limitation of liability of "the owner of any vessel," etc.

The Harter Act was again construed in *The Murrell,* 200 Fed. 826, and applicant relies upon the statement of the court, page 829, that, to say the owner of the tug was "engaged in transporting merchandise or property" where the tug and tow belong to distinct owners having with each other only the relations arising under an ordinary contract for safe towage, would be to extend the words of that act so as to make them include what Congress never intended them to include; that there is nothing in the agreement of the owner of a tug to tow another owner's vessel which can be regarded as making the latter vessel or her cargo the cargo of the tug. That, too, was an action for damages to the tow. While the barge there was under charter to the tow, the court said that to regard tug and barge as one vessel in that case and thus bring it under the Harter Act would be to permit petitioner to treat both vessels as one

in a proceeding instituted by him on the theory that they are distinct and independent.

In *Bradley* v. *Lehigh Valley R. Co.*, 145 Fed. 569, 573, the court distinguished that case, where the relation of the tug was one of towage, from *The Nettie Quill*, 124 Fed. 667, where a locomotive carried on a barge towed by that steamer was dumped overboard, in which case a bill of lading had been issued by the steamer, resulting in a contract of affreightment rather than towage.

Applicant further contends that there are none of the distinctive features of carriage in its business; that it does not carry anything, does not contract nor have possession of cargoes or passengers, has no connection with any contract of carriage, has none of the responsibilities of a carrier, is not engaged in the business of a carrier, and that therefore it is not a carrier. It says that it has been a litigant in numerous matters in the Federal courts, but in none of those cases has it or its tugs been held to liability as a carrier.

It will be seen that all the foregoing decisions involved claims for damages to the tow or its cargo, and all held in effect that the owners of towboats, when engaged only in towing vessels belonging to others and not under contracts of affreightment, were not carriers. Relating, as they do, to loss and damage, we do not accept them as determinative of the status of towers under part III of the act, which specifically provides in section 320(d) that:—

> Nothing in this part shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this part.

In view of section 320(d), we consider that a finding that towers are carriers within the contemplations of part III would not affect their liability for loss or damage. Therefore the foregoing decisions may not be construed as a bar to the regulation of towers under part III.

Applicant asserts that part III does not authorize nor contemplate that a permit be issued to or held by anyone but a carrier, and that the history and plain language of part III do not justify the view that Congress intended to authorize the Commission to regulate anyone other than a carrier. In support thereof it relies upon the repeated use of the term "carrier" throughout part III, and cites the use of the same term in the Congressional Record when part III as a bill was under consideration in Congress. It contends that a carrier is one who carries, and that "carry" is defined as "to convey or transport while supporting." As it does not furnish the vessel which supports the freight transported in its tows, applicant concludes that it is not a carrier. But the Circuit Court of Appeals, Seventh Circuit, in *Belt Ry. Co. of Chicago v. United States*, 168 Fed. 542 (dismissed on certiorari, 223 U. S. 743), found the Belt Railway Company of Chicago to be a common carrier in the service of transferring the cars of trunk lines from the tracks of one trunk line to the tracks of another within the terminal area, by means of its locomotives, although it did not furnish the cars, and had no dealings with the shippers.

Towage, as such, is specifically mentioned in part III only twice. Section 303, dealing with exemptions, in par. (f) provides that the provisions of this part shall not apply (1) to transportation by water by a carrier by railroad subject to part I or by a motor carrier subject to part II incidental to transportation subject to such parts, in the performances of floatage, car ferry, lighterage or towage, but such transportation shall be subject to part I or part II; and (2) to transportation by water by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad, or an express company, subject to part I, a motor carrier subject to part II, or a water carrier subject to part III, in the performance of floatage, car ferry, lighterage, or towage; but that such transportation shall be considered to be performed by such carrier or express company as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water to which such services are incidental.

Clearly, applicant's operations are not those described in section 303(f)(1); and they are not those described in section 303(f)(2) except to the extent that it performs them for another carrier which is subject to parts I, II or III; and to the extent that its operations were performed for such other carriers (whether as agent or under a contractual arrangement) it acquired no "grandfather" rights. This section of the act discloses no intention to exempt any towage whatever from regulation, but insures the regulation of certain described towage in connection with regulation of the carrier in whose interest it is performed. If any inference whatever as to towage not described therein is to be drawn from this section, that inference is the purpose of the Congress to regulate, not to exempt from regulation.

Part III, section 302, Definitions, provides, par. (c), that, as used therein, the term "water carrier" means a common or a contract carrier by water. "Common carrier by water" as defined in par. (d) means any person which holds itself out to the general public to engage in transportation by water in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, with one exception not pertinent here. "Contract carrier by water" per par. (e), means any person which, under individual contracts or agreements, engages in the transportation (other than that referred to in par. (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation. An all-inclusive definition of "transportation" is not given in this part, but it is provided (section 302(h)) that the term "transportation" includes the use of any transportation facility (irrespective of ownership or of any contract, express or implied, for such use), and includes any and all services in or in connection with transportation, including the receipt, delivery, (omission) storage, and handling of property transported or the interchange thereof with any other agency of transportation. And "transportation facility" is defined (section 302(g)) to include any vessel, warehouse, wharf, pier, dock, yard, grounds, or any other instrument or equipment of any kind, used in or in connection with transportation by water subject to this part.

Transportation is defined in Funk and Wagnalls Standard Dictionary as "the act of transporting, or the state of being transported; conveyance; carriage of persons or commodities from one place to another"; and "transport" as "to carry or convey from one place to another. Specifically: • • • (2) *Nautical.* To haul (a vessel) about a harbor by hawsers."

A tug which engages in towing barges for a carrier subject to the act in the conduct by the latter of interstate transportation, becomes a "vessel used in or in connection with transportation by water subject to" part III. Some of applicant's business is of that nature; but what proportion, and how much thereof would be subject to regulation only as the business of the bill-of-lading carrier, is not disclosed on this record, as applicant did not make a full disclosure of its operations because of its contention that it is not a carrier.

That the furnishing of a facility in connection with interstate commerce by railroad is sufficient to constitute one a carrier subject to part I was settled in *Union Stock Yard & Transit Co.* v. *United States,* 308 U. S. 213. In that case a stockyard company which had divested itself of control of its railroad tracks, but which was engaged in loading and unloading livestock through use of its platforms and chutes, was held to be a "carrier" providing railroad "terminal facilities", and engaged in "transportation of property wholly by railroad" within part I. Clearly, to the extent that any tower furnishes facilities essential to transportation in interstate or foreign commerce which is subject to part III, it is a carrier within the meaning of that part.

Certainly a tower is engaged in transportation, in the ordinary sense of that term. It hauls vessels from place to place by hawsers. Vessels are property: therefore it conveys property from one place to another. In our opinion, "transportation", as used in part III, is to be taken in its ordinary sense, in addition to including the facilities and services specified in section 302(g) and (h). In this view of the term, a tower engages in transportation by water in interstate or foreign commerce of property or a class of property for compensation, when for compensation it tows

barges across a State line. It is therefore a carrier within the definitions of carriers in part III, and subject to the extent that its operations fall within the exemptions provided in that part.

But entirely apart from the views expressed in the next three preceding paragraphs, we think that authority to regulate towers engaged in the interstate towing of barges for compensation is within the broad purposes of part III. There is no contention but that it was intended to subject to regulation the barge in which commodities are moved in interstate commerce. Obviously an inert barge cannot move property in interstate commerce without the aid of a propelling medium. To hold that we can regulate the barge, but cannot regulate the towboat without which the barge cannot move, would be like holding that we can regulate railroad cars but not separately-owned locomotives by which the cars are moved, or can regulate automobile freight-carrying trailers but not separately-owned motors which draw them. It would nullify our authority to see that the charges against shippers are reasonable and nondiscriminatory in at least those numerous instances where the shipper provides his own barge. And it would leave unregulated one class or kind of transportation and a considerable volume of interstate commerce as to which there is, in our judgment, the same need for regulation as in the case of other classes or kinds of transportation and other interstate commerce, which are admittedly subjected to regulation.

Even the furnishing for compensation (under a charter, lease or other agreement) of a vessel, to a person other than a carrier subject to the act, to be used by the person to whom the vessel is furnished in the transportation of its own property, constitutes one a contract carrier by water; section 302(e). Since one who merely furnishes a tugboat to another for the use of the latter in the transportation of his own property is subjected to regulation, *a fortiori* would Congress intend to subject one to regulation who operates a tug for compensation in transporting barges laden with the property of the barge owner. Seventy percent of applicant's business is of the latter nature.

We conclude that part III discloses the intention of Congress to regulate towers engaged in interstate towing except to the extent that specific exemptions are provided.

Transportation By Water Between Two Points In The Same State But Passing Through Another State En Route.

Having concluded that towers are embraced within the term carriers as used in part III, we now turn to a consideration of whether transportation by water between points in a single State but passing through another State is within our jurisdiction under part III. For, as has been shown, in performing towage betwen New York Harbor and upper Hudson River points much of applicant's traffic crosses the New York-New Jersey State line. This question was not argued by applicant, because of the position it took that it is not a carrier.

Under part I of the act, jurisdiction is specifically conferred over transportation "from one State * * * to any other State." Sec. 1, (1) (c). It is further provided, Sec. 1, par. (2) (a), that the provisions of this part do not apply to transportation "wholly within one State and not shipped to or from a foreign country from or to any place in the United States."

Part II specifically confers jurisdiction over transportation "between any place in a State and any place in another State or between places in the same State through another State." Sec. 203 (a) (10).

Under part III jurisdiction is specifically conferred over transportation "from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States." Sec. 302 (i) (1). It is also provided, sec. 303 (k), that "nothing in this part shall authorize the Commision to prescribe or regulate any rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose. A like provision is contained in Part II, sec. 216(d).

It will be seen that jurisdiction over transportation between points in a State through another State is conferred in specific terms in part II, but not in parts I and III. The Commission and the courts have construed part I as conferring jurisdiction over such transportation, and this is so well established as to require no citations. Should a like construction be placed upon part III?

Examining one of the cases covering such transportation to see the reasoning followed, we turn to *United States* v. *Delaware, L. & W. R. Co.*, 152 Fed 269. The shipment under consideration moved from New York, N. Y. to Buffalo, N. Y., through New Jersey and Pennsylvania. The court, although recognizing that the language "from one State to any other State" was susceptible of the literal interpretation that it would not include the transportation there involved, pointed out also that "at the same time it is a perfectly correct statement to say that goods shipped from New York to Buffalo on the Lackawanna road are transported from one State to another"; and expressed the view that too much weight should not be given "to a critical examination of the precise language" defining transportation subject to part I as transportation "from one State to any other State." Such transportation, said the court, cannot be efficiently regulated at all unless it is regulated by the United States. The court referred to the provision excepting transportation "wholly within one State", and reasoned that the word "wholly" imports that the provisions of the act shall apply to any transportation of property which is not wholly within one State. But it does not follow that the court would have held otherwise than it did in the absence of such a provision, when it is considered that this was a proceeding under the Elkins Act, and if the carrier was not subject to part I with respect to this transportation, it could rebate with impunity, as obviously it was not an intrastate shipment which could be regulated by the State of New York, and in the absence of Federal regulation it was not subject to regulation at all; and there could be no reasonable ground for supposing that Congress intended to produce such a result. The exception in part I as to transportation "wholly within one State" amounts to nothing more or less than a denial of any jurisdiction

over intrastate commerce as such. As above indicated, part III likewise contains a provision to the same effect only broader, namely, that this Commission shall not regulate rates for intrastate transportation for any purpose whatever; so that if the words "wholly within a State" in part I fortify the conclusion that the Commission has jurisdiction under that part over transportation between points in a single State through another State, the part III provision referred to fortifies a like conclusion as to similar transportation under part III. The reasons for holding the transportation considered in the case cited, to be subject to part I, are as cogent reasons for finding transportation of the character here considered to be subjecte to part III.

Taking one illustration: If we were to find that we cannot regulate transportation by water between two points in the same State which passes through another State enroute, we would be in the position of saying that because the origin and destination are in the same State we have no jurisdiction over through all-water shipments from Chattanooga, Tenn., on the Tennessee River, to Memphis, Tenn., on the Mississippi River, although the route extends from Tennessee through Alabama, back through Tennessee, and through Kentucky to the Ohio River, thence on the Ohio along the border between Illinois and Kentucky to Cairo, Ill., thence on the Mississippi bordering Kentucky, Missouri, Arkansas and Tennessee; but at the same time asserting jurisdiction over transportation between intermediate points on the same route where origin and destination are in different States; in other words, that we can regulate the rates for the several interstate *parts* of the transportation, but cannot regulate the rates for the *through* interstate transportation which is comprised of such parts. The through transportation would thus be left subject to no regulation whatever. *Missouri Pacific R. Co.* v. *Stroud*, 267 U. S. 404.

As between two interpretations, one of which would leave such water transportation as is here considered free of all regulation, and the other of which would subject such transportation to the jurisdiction of this Commission in harmony with the jurisdiction which it clearly has over similar rail

and motor transportation under parts I and II, we entertain no doubt that the latter is the correct interpretation, and we so construe part III.

Is Applicant A Contract Carrier or A Common Carrier?

We come now to a consideration of the issue whether applicant is to be regulated as a contract carrier or as a common carrier. That question must be determined by the nature of the business applicant was conducting on and since the "grandfather" date. "The character of the service, in its relation to the public, determines whether the calling is a public one." *Union Stock Yard & Transit Co.* v. *United States*, 308 U. S. 213, 220.

The fact that applicant does not assume liability as a common carrier for the freight contained in the barges towed is not conclusive that applicant is not a common carrier. In *Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 207, quoting *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, the court said, "A common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests." In that case a tower of logs was held to be a common carrier, regardless of the fact that all tows were "at owner's risk." It was engaged in the general towboat business; by a tariff it gave public notice of its wilingness to transport logs, and the court found that its towboats were devoted to the public use.

Applicant's contention that all its towage has been performed either upon yearly contracts, or upon special contracts covering the individual job, is not determinative of the issue. The ordinary bill-of-lading issued by common carriers generally on every shipment transported is an individual contract covering the transportation of an individual shipment.

The test of a common carrier is whether it transports for the public generally. The evidence of record on that subject is, in part, as follows:

> Question: Within the range of your operation, with credit considerations being favorable, contents of the

barges being what you think they should be, will you tow for any one seeking your services?

Answer: We are like to, yes.

• • • • • • •

Answer: We don't hold ourselves out at all. As a rule, we do take orders, as I mentioned. I think that 12 or 13 percent of our business is miscellaneous business. People will call up today and say that they want us to take a barge from here to there. We ask what kind of barge it is and how much it carries, and we give them a price and we do that job. The rest is all by yearly or regular arrangements with customers, even down to the naming of the barge that they want towed.

• • • • • • •

Answer: We have some on the blacklist, whom we do not tow, because we know that they don't pay.

• • • • • • •

Question: But if there is some boat owner who may not have a yearly contract with you—and provided that the vessel and the cargo and the credit arrangement are satisfactory—you will tow his boat in that fleet?

Answer: Surely—if he gives us an order for it before the tow starts.

Witness further testified that in the tows that leave New York nightly for up-river points "we have practically no limits; we take all that will come"; and explained that by "all that will come" he meant, "individual customers or people who have made arrangements with us. • • • We must have the order for the barge before the barges leave the stake boat." He further testified that arrangements for a particular towing job could be entered into over the telephone, and upon inquiry whether such an arrangement would be entered into with persons with whom he had had no prior dealings, replied: "We would want to know something about them. If it was out of the blue, we would want

to know who he was, and what he had to go, before we would give him a price.". Sometimes prepayment of charges has been required. As to the breadth of applicant's willingness to transport: Witness testified that "Having been there since 1837, we pretty much know every manufacturer on the river. We go to him and ask him for a contract, and show him what kind of service we can give, and he gives us the contract." And again, respecting the daily towing schedules: "The business has been going on for so long that everybody knows it."

We find that the evidence dicloses the fact of a general holding out tempered by prudence, a desire for business rather than a desire to exclude any. We find as a fact that applicant holds itself out to the public to tow for anyone with ability and willingness to pay for the service. Such a holding out, accompanied by performance, in itself constitutes one a common carrier.

Findings of Fact and Conclusions Thereon

Upon the evidence we find the following facts:

1. That this application was filed May 21, 1941, under section 309 (f) of the Interstate Commerce Act, which was within a period of 120 days after that section became effective, but expressly without prejudice to applicant's contention that it is not a carrier, does not transport any persons or property, and is not subject to part III of the act.

2. That applicant, with its own non-carrying vessels was engaged in towing non-self-propelled freight-carrying vessels in interstate or foreign commerce on January 1, 1940, within the limits of New York Harbor, as those limits are defined by us in Ex Parte No. 140, and, during the 1939 season of navigation, on the Hudson River as far north as Waterford, N. Y., and serving intermediate ports.

3. That it has continued so to operate since that date, down to the date of the hearing herein.

4. That on the aforesaid waterways applicant held itself out to tow between all intermediate points; and that it did tow to and from a sufficiently representative number of

points to constitute a fulfillment of its holding out as a carrier by towboat between all points on those waterways.

5. That its towage charges have been based upon the size and load-water draft of the vessels towed, and not upon the character of the freight loaded in said vessels except to the extent that the weight of the lading affects the draft of the vessel.

6. That its holding out was to tow non-self-propelled freight-carrying vessels which it considered in seaworthy condition, both loaded and empty, regardless of the character of freight loaded therein, for all who desired to engage its services and whom it considered financially responsible, and that it did so transport.

Upon these facts we conclude that applicant was in bona fide operation in interstate commerce as a common carrier by water of non-self-propelled freight-carrying vessels by means of towing vessels between all points within the limits of New York Harbor, N. Y. and N. J., as those limits are defined in our order of March 26, 1941, entered in Ex Parte No. 140, and on the Hudson River between New York Harbor and Waterford, N. Y., and all intermediate points; that such operation has been continued since that date; and that applicant is entitled under the "grandfather" clause of section 309 (a) of the act to a certificate of public convenience and necessity authorizing continuance of such operation, subject, however, to general conditions which are necessary to carry out, with respect to continuation of applicant's operations, the requirements of part III of the act, and the orders, rules and regulations of the Commission thereunder.

The petition to dismiss the application will be denied. A certificate will be issued in acordance with these findings.

Referring to applicant's prayer, made without prejudice to its request for dismissal of its application, that it be held exempt from and not subject to regulation insofar as its towage services are performed wholly intrastate, irrespective of whether the vessels to which the towage services are rendered are engaged in, or any cargoes or property on board those vessels are moving in, interstate commerce:

A railroad company engaged in moving the cars of others from one trunk line to another with its own locomotives is a common carrier engaged in interstate commerce and subject to the Safety Appliance Acts, even though its services are performed wholly within a State, and though it furnishes no cars, issues no bills of lading, and has no dealings with the shipper or with anyone on his behalf. *Belt Ry. Co. of Chicago* v. *United States, supra.* Likewise, when applicant tows the barges of other carriers, which barges are moving in interstate commerce, applicant engages in interstate commerce. Whether its participation in such interstate commerce is under the conditions embraced in section 303(f), thus exempting the tower from regulation and subjecting the towage to regulation as a part of, and in the same manner as, the transportation of the carrier from whom applicant receives or to whom it delivers the barges, we cannot determine upon this record because applicant did not make a full disclosure of the facts with respect to such towage. No order of exemption by us is required by towers whose towage is embraced in section 303(f). Commissioner Miller concurs in the results.

APPENDIX "F".

Certificate and Order.

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 15th day of June, A. D. 1942.

No. W-359.

Cornell Steamboat Company—Contract Carrier Application.

The Cornell Steamboat Company having filed an application under the provisions of section 309(f) of the Interstate Commerce Act for a permit to continue operations as a contract carrier by water; a hearing having been held; and full investigation of the matters and things involved having been made, and said division, on the date hereof,

having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is hereby certified, That the public convenience and necessity require the continuance of operation by applicant as a common carrier by water by towage of non-self-propelled freight-carrying vessels of others, in interstate or foreign commerce, between all points within the limits of New York Harbor, N. Y. and N. J., as those limits are defined in our order of March 26, 1941, and on the Hudson River between New York Harbor and Waterford, N. Y., and all intermediate points.

It is ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.

It is further ordered, That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act, and the orders, rules, and regulations of the Commission thereunder.

It is further ordered, That this certificate and order shall take effect and be in force from and after July 24, 1942.

By the Commission, division 4.

W. P. Bartel,
Secretary.

(Seal.)

APPENDIX "G".

Interstate Commerce Commission.

No. W-359.

Cornell Steamboat Company Contract Carrier Application.

Submitted—— Decided——

Applicant found entitled to continue operations as a contract carrier by water, in the use of its towboats in towing barges, scows and similar vessels, loaded or light, between points in New York and New Jersey located on the waters of New York harbor, on a year around basis, and between those points and points on the Hudson River up to and including Waterford, N. Y., on a seasonal basis, by reason of having been engaged in such operations prior to and on January 1, 1940, and continuously since. Permit issued and petition to dismiss application denied.

Robert S. Erskine for applicant.
Stanley Carpenter for rail carrier protestants.
Reginald G. Narelle for water carrier interveners.

Report Proposed by Andrew C. Wilkins, Examiner.

By application filed May 21, 1941, Cornell Steamboat Company, a New York corporation, with its principal office at Kingston, N. Y., seeks a permit under the provisions of section 309 (f) (g) of the Interstate Commerce Act authorizing continuance of operation as a contract carrier by water in interstate or foreign commerce, in furnishing under individual contracts or agreements the services of its fleet of tugboats in towing barges, scows, and similar vessels carrying their cargoes either below or on deck, from and to all points on the Hudson River between Waterford, N. Y., and New York, N. Y., harbor points located in New York or New Jersey on the waters of the lower Hudson and the adjacent waters of New York harbor. The application was filed without prejudice to applicant's contention that in its performance of towage services for hire it is not a carrier and does not carry or transport any passengers or property, and that it is not subject to the Act.

On May 21, 1941, applicant filed a petition to dismiss its application on the grounds that, in the performance of its business of furnishing towage services as above described, it does not engage in nor perform nor furnish any transportation of passengers or property within the language and intent of the provisions of part III of the Act, and, therefore, is not subject to and does not come under the regulations of the Act. Without prejudice to its request for dismissal on those grounds, applicant further prays that it be held exempt from and not subject to regulations of the Act insofar as its towage services are furnished wholly intrastate to and from and between points within the State of New York, irrespective of whether or not the vessels to which the towage services are so rendered or any cargoes or property on board those vessels are or may be engaged in intrastate movements.

At the hearing rail carriers in Official Classification Territory appeared by counsel as protestants but offered no evidence. The Northeastern Inland Waterways Association appeared as an intervenor by its president, and indicated an interest in developing all of the facts for the record, but offered no evidence. These intervenors will have a further opportunity to clarify their positions for the benefit of the Commission in any exceptions to the proposed report herein, which they may file.

Applicant was incorporated in 1878 to continue the towing business started in 1837 by the grandfather of its president, who has held that position for the past 29 years. From its inception the business of the applicant has been and still is completely owned by succeeding generations of the same family. At the time of the hearing applicant owned and operated a fleet of upwards of 33 towboats, varying in power and size, some of which are powered by steam and others by diesel engines. One scow is maintained in connection with its repair equipment but applicant does not own or operate any barges or lighters or similar type of carrying craft. No cargoes of merchandise for hire or passengers are carried on any of the towboats and they are used exclusively in towing for applicant's customers, over 70 percent of whom are shippers who own

or operate the scows or barges used in carrying their own merchandise. Other customers are water carriers.

Towing services are rendered for customers in New York harbor and anywhere on the Hudson River up to Waterford, which is between the Troy lock and the entrance to the Erie Canal. Operations between points bordering on New York harbor are conducted on a year around basis but those on the Hudson are suspended during the season when ice prevents them, which is generally from the early part of December to about the middle of March. Applicant does not render any towing services on the ocean outside of the limits of New York harbor, as determined by the Commission in its order entered March 26, 1941, in Ex Parte No. 140.

The largest part of applicant's business is done on time contracts entered into for a period of years, while some contracts run for a single year and the balance consists of a small amount of miscellaneous contracts arranged from day to day. Arrangements for all of its towing services, whether for more than a year or for an individual job, are based on separate agreements or contracts. Most of the vessels towed are scows which carry their cargoes on deck and deep boats or barges which carry the cargoes below deck in the hold. The basis for charges for the towing services has no relation to, or any connection with the amount of the freight charges paid by the owners of the cargoes for their transportation when they do not also own the scows or barges. The only interest applicant has in a cargo is its weight and the size of the scow or barge on which it is loaded. The rate charged for towing is lower for the larger units. For example, the rate per ton for towing a 2000-ton barge would be less than the rate per ton for a 200-ton barge. The rate is also lower if the scow or barge is towed with others in a flotilla which applicant schedules for its customers to leave New York harbor on certain days of the week and to leave Albany, N. Y., or some other point on the upper Hudson certain other days of the week. This regular service is maintained under contract to meet the needs of certain customers. Other customers who can wait for their service until the regular flotilla is towed are given the benefit of the lower unit cost. If a cus-

tomer desires individual service on a certain day the rate is necessarily higher.

No holding out of any offer of towing services is advertised by applicant in any daily papers or trade journals. Its witness thought that a simple announcement of towing services had been carried in the Bullinger's Guide for many years. An examination of the 1939, 1940 and 1941 editions of that guide fails to disclose such an announcement. Its business has been built up with certain individual customers over the many years of its operation. It has at times refused requests for towing services for various reasons, among which are the condition of the property to be towed, the requirement of a release from all liability, and when the requested service could not be rendered without injury to service desired by one of the regular customers.

Applicant does not issue any bill of lading or similar document with respect to the cargoes on the scows or barges towed. Each scow or barge has its own captain who looks after the safety of the vessel and its cargo. Neither the captain of the towboat nor any other employee of applicant has anything to do with the cargoes on the vessels in the tow. Applicant generally has no interest in or knowledge of the origin or final destination of the cargoes, and when the towing service is complete with the landing of the vessel at the place agreed upon, no further services are rendered. No arrangements for any through movement, of which the towing services might be a part, are ever entered into by applicant with any other carrier. Therefore, the towing services rendered by applicant between points in the State of New York are, insofar as intrastate cargoes are concerned, intrastate in character and are not subject to regulation by this Commission. See section 302 and section 303(j)(k) of the Act. Approximately 95 percent of the towing services of applicant are rendered between points in the State of New York. However, these services are sometimes rendered in connection with interstate cargoes, and applicant requests that such services, irrespective of whether the vessels or their cargoes are or may be engaged in interstate movements, be held exempt from regulation. The Commission has no authority to hold such services exempt from regulation. It does have the discretion under

the provisions of section 306(e) to grant relief to contract carriers with respect to the filing of minimum rates and charges and observance thereof. But the evidence in the present record does not warrant the exercise of that discretion herein. Moreover, applicant has on file with the Commission its tariff I. C. C. No. 2, containing schedules of its minimum rates and charges for the performance, as a contract tower, of only such towage services as it may see fit to undertake on the Hudson River between Waterford, N. Y., and New York, N. Y. and on the waters of New York Harbor and the waters adjacent thereto, and intermediate points.

A check of applicant's records for the year 1940, which is considered fairly representative of its annual business for the past ten years, shows that only 4.4 percent of its towing services were rendered between points in New Jersey adjacent to the lower Hudson River or New York Harbor and points outside the harbor in New York State. Regardless of the small proportion of the services rendered in connection with interstate movements it will be necessary for applicant to have a permit if it continues to render such services.

Towing services rendered by applicant in connection with interstate cargoes between points within the limits of the Harbor of New York, N. Y., when such services are not a part of a continuous through movement under common control, management, or arrangement to or from a place outside the limits, have been exempted from regulation by the order of March 26, 1941, entered by the Commission in Ex Parte No. 140, pursuant to the provisions of section 303(g) of the Act.

Upon brief applicant reaffirms the position taken in its petition to dismiss its application herein. It contends as follows:

> 1. That there are none of the distinctive features of carriage in applicant's business, in that he does not carry anything, does not have possession of either cargoes or passengers, has no direct or indirect connection with any contract of carriage, has none of the

responsibilities of a carrier, and that he is not a carrier and is not engaged in the business of a carrier.

2. That by the plain language of the Act, the only persons or parties who are required to apply for certificates or permits and to whom the Commission has authority to issue them, are carrriers; and as applicant is not a carrier it necessarily follows that the Commission has no authority to issue to or require applicant to hold a permit as a contract carrier.

3. That the Commission may regulate tugs and towage services which are owned and used as a part of the business of carriers subject to its regulation, but that nothing in the statutory definitions of "transportation facility" and "transportation" in section 302(g) and (h) gives to the Commission the authority to regulate tugs or towage services of an independent tower, who is not engaged in the business of "carrying" and who is not a "carrier."

4. That the administrative ruling of the Bureau of Water Carriers to the effect that a towing company such as applicant must be regarded as being a "carrier" subject to the Act if it performs towage for a shipper or anyone not a carrier subject to the Act, is apparently based on a backhanded, or negative interpretation of the language of section 303(f)(2), and has no logical foundation and is contrary to the plain intent of Congress that section 303(f)(2) should eliminate and exempt incidental services *even when* performed for a carrier subject to part III.

5. That in instances in which the use of tugs or towage services are furnished *in fact* by the carrier itself, they are an integral part of the carrier's business, and subject to regulation just as other phases of his business; but such instances lend no support to a conclusion that a tower like applicant, who merely performs towage services as herein described,

is engaged in the business of a contract carrier by water.

6. That under the common meaning of the words it has long been an accepted fact that a "tower" is not a "carrier", and it must be assumed that when Congress, throughout all of the provisions of part III of the Act, limited those provisions to carriers by water, either common or contract, it intended to give the words their ordinary meaning, and did not intend to authorize the Commission to regulate anyone other than such a carrier.

The above is a brief outline of the main points argued in considerable detail by complainant in its brief, which includes excerpts from certain court decisions cited in support of the above contentions, all of which have been given careful consideration in arriving at the conclusions and finding hereinafter recommended.

Upon the record herein the Commission should reach the following conclusions: that the definitions of "transportation facility" and "transportation" as set forth in section 302(g) and (h) when applied to the towing services of applicant in the use of its towboats, which are instrumentalities or equipment, in connection with transportation by water, subject to part III, brings applicant within the definition of a "contract carrier by water" set forth in section 302(e), and subject to regulation under the Act; that the provisions of section 303(f)(2) do not have the effect of exempting transportation by water furnished by any person to a shipper or a carrier not subject to parts I, II or III of the Act, nor do those provisions entirely exempt such transportation from regulation when furnished to carriers subject to parts I, II or III, but rather they make such transportation subject to regulation in the same manner as the transportation by such carriers to which such services (performance of floatage, car ferry, lighterage, or towage) are incidental; that it does not appear that the towing services, rendered by applicant to water carriers from and to points outside the limits of New York Harbor are incidental to any transportation services rendered by

such carriers but rather the entire or principal transportation services are rendered by applicant in towing the scows or barges for those carriers, since there is no evidence that those carriers have undertaken to perform under published rates, have performed, or expect to perform any transportation of the scows or barges in addition to the transportation services performed by applicant whereby the towage services of the applicant could be considered "incidental" to any transportation performed by such carriers; and that it must be concluded that the towage services performed by applicant for carriers from or to points outside the limits of New York Harbor, which are not shown to be incidental to any transportation performed by such carriers, and not otherwise exempt under the Act, are not exempt under the provisions of section 303(f)(2); that applicant having been in bona fide operation as a contract carrier by water in the performance of both regular and seasonal towage services prior to, on and since January 1, 1940, over the route or routes and between the ports above described, and having filed its application for a permit within the time limit and in conformance with the other provisions of section 309(f)(g), is entitled to such a permit; and that the petition to dismiss its application for a permit should be denied.

The Commission should find that applicant was in bona fide operation on January 1, 1940, as a contract carrier by water, in interstate or foreign commerce, in the use of its towboats in towing barges, scows and similar vessels loaded with cargoes or light, between points in New York and New Jersey located on the waters described as included in New York Harbor in the order entered March 26, 1941, in Ex Parte No. 140, on a year around basis, and prior to January 1, 1940, between those points and points on the Hudson River up to and including Waterford, N. Y., on a seasonal basis, ice on the river permitting, from about the middle of March to the early part of December; that such year around and seasonal operations have been continued since that date; and that applicant is entitled to a permit as a contract carrier by water, authorizing the continuance of such year around and seasonal operations, subject, how-

ever, to general conditions which are necessary to carry out, with respect to the continuation of applicant's operations, the requirements of part III of the Act, and the orders, rules, and regulations of the Commission thereunder.

An appropriate permit should be issued and an appropriate order denying the petition to dismiss the application should be entered.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Petition for Appeal.

Civ. 21-35.

CORNELL STEAMBOAT COMPANY, *Plaintiff*,

against

UNITED STATES OF AMERICA, *Defendant*,

and

INTERSTATE COMMERCE COMMISSION, *Intervening Defendant*,

and

BOSTON TOW BOAT COMPANY, *Intervening Plaintiff*,

and

NATIONAL WATER CARRIERS ASSOCIATION, INC., *Intervening Defendant.*

Your petitioner, Boston Tow Boat Company, respectfully prays that, in accordance with 28 U. S. C. Secs. 47 and 47a, the appeal of Boston Tow Boat Company, intervening plaintiff in the above entitled action, from this Court to the United States Supreme Court from the decree in judgment entered herein on August 2, 1943 be allowed, and that the bond for costs on appeal with good and sufficient surety in the sum of $250, submitted herewith, be approved.

The said intervening plaintiff submits herewith for filing its assignment of errors and adopts by reference the

statement as to the jurisdiction of the United States Supreme Court filed in this action by Cornell Steamboat Company, plaintiff petitioner for appeal.

Dated, New York, August 30, 1943.

BINGHAM, DANA & GOULD,
ALBERT T. GOULD,
CHARLES S. BOLSTER,
By CHARLES S. BOLSTER,
A Member of the Firm,
1 Federal Street,
Boston 10, Massachusetts.

(8167)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 384.

CORNELL STEAMBOAT COMPANY,

Appellant,

against

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and NATIONAL WATER CARRIERS ASSOCIATION, INC.,

Respondents.

BRIEF FOR APPELLANT.

ROBERT S. ERSKINE,
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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 384.

CORNELL STEAMBOAT COMPANY,
Appellant,

against

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and NATIONAL WATER CARRIERS ASSOCIATION, INC.,
Respondents.

Appeal from the District Court of the United States for the Southern District of New York.

BRIEF FOR APPELLANT.

STATEMENT.

1. Nature of the Proceedings:

This is an appeal from a decision and order of a statutory court of three judges in the Southern District of New York (Frank, C. J., Coxe, and Bright, D. JJ.), denying a petition to enjoin, set aside, suspend and annul, a certificate and order of the Interstate Commerce Commission under which Cornell Steamboat Company, although engaged only in furnishing towage services for hire, was certified to be a common carrier by water in interstate commerce, and held subject to regulation by the Commission under Part III of the Transportation Act of 1940.

Previously to the said Act (approved September 18, 1940), this Court and the lower Courts had repeatedly found that, in law and in fact, an independent tower for hire, such as this appellant, was not a common carrier and was not a carrier at all.

Thus, the principal question presented in these proceedings is whether Congress, by the provisions of Part III of the Act, suddenly changed the long established status of independent towers from that of non-carriers to that of common carriers by water.

In the provisions of Part III, Congress specifically authorized the Commission to regulate only common carriers and contract carriers by water in interstate commerce. The Act contains no pronouncement of Congress to include in those two categories any other persons than the common or contract carriers previously defined by the Courts and previously known and recognized under the established law and the existing usages of the business world.

Therefore, in determining the principal question, stated above, there are the co-related questions (1) whether an executive tribunal, such as the Interstate Commerce Commission, can assert its own interpretation of the Act to make such a drastic change in the status of independent towers, in the absence of specific enactment by Congress, and (2) whether the conversion of a non-carrier into a common carrier, for purposes of regulation, would be constitutional, even if Congress had intended it.

If the appellant can be held subject to the Act at all, there are two subsidiary questions,—(a) whether its towages between points in New York State are interstate, under the definition found in Section 302(i)(1) of Part III; and (b), whether it should be classed as a contract, rather than a common carrier.

2. The nature of the appellant's business.

For over 100 years, successive generations of the same family have owned the appellant and its predecessor organizations, the business having been incorporated in 1878.* It engages solely in the business of furnishing towage services for hire, as an independent tower, and was so engaged on January 1st, 1940. The word "independent" is used herein to emphasize the fact that appellant has no direct or indirect financial interest in, or connection with, any person or company engaged in the business of a carrier. It does not carry passengers or merchandise on its tugs, and does not own or operate any "carrying" vessel. It does not enter into any contracts with owners of merchandise or property for the carriage thereof.

It does not take possession of the vessels which it tows or the cargoes laden thereon,—those vessels and their cargoes remaining in the possession and care of their captains and crews who are employees of the owners of the carrying vessels.

Its services are rendered by its fleet of steam and diesel tugboats, which merely attach their lines to and move the "carrying" vessels from point to point as ordered by the owners or operators of those vessels. Most of the vessels towed are barges, scows, canalboats, and similar craft which have no motive power.

Over 95% of appellant's annual towage services are rendered on the Hudson River (except when navigation is closed by ice in the winter), between New York City and other points in New York State as far north as Waterford. The balance of its services are in the waters surrounding

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* This and the following statements of facts are summarized from the report of Examiner Wilkins (R. 16-24), based upon the uncontradicted testimony of the appellant's president, Frederick Coykendall.

New York City (the Harlem and East Rivers and New York Bay), and occasionally to points in New Jersey on the west side of the Bay or the lower end of the Hudson.

The appellant has no interest in and often does not know the nature of the cargoes in the vessels towed. It has no voice or interest in any contracts of carriage between the barge owners and the owners of the merchandise. It issues no bills of lading for the cargoes on the vessel towed, and has no interest in, and does not share, any freights paid by the cargo owners to the barge owners. It has no interest in, and frequently has no knowledge of the origin or final destination of the cargoes on the vessels towed. It has nothing to do with their loading or discharging, delivery or forwarding. Its services commence when its tugs take the boats in tow, and end when the boats are moored or docked at their destination. It is not liable to either the boats or their cargoes as an insurer or bailee, but only for proved negligence in the performance of the towage services: and as a tower, it can and frequently does contract for a release from liability for negligence.

Some of its larger customers carry their own products upon their own barges, but that fact in no way alters the nature of the appellant's towage services, for such cargoes, like all others, remain in the possession and care of the captains and crews of the "carrying" vessels, and the appellant merely contracts to tow those vessels.

The appellant's towage charges are wholly independent of and have no relation to the carriage of the merchandise by the barges or any freights paid therefor, and are secured by maritime liens against the vessels towed,—not against their cargoes. The appellant's towage charges are based upon the length of the trip and the size and tonnage of the

vessel towed. The towage services can be furnished, if required, to a single barge at a time, but will then cost the customer more per barge than if several barges are towed together in a flotilla.

Over 85% of appellant's services are furnished under time contracts entered into for periods of one to three years. The balance of the services represent miscellaneous business under contracts arranged from day to day. The appellant does not advertise its services, and does not hold itself out to tow for all-comers. To the contrary, it frequently declines to tow, and enters into contracts only when its tugs are available and the work can be done under terms and conditions satisfactory to it.

3. The Transportation Act of 1940, Part III.

In Part III of the Act, relating to transportation by water, sections 309(a) and 309(f) authorize the Commission to certify (or issue permits to) and regulate common carriers by water and persons engaged in the business of contract carriers by water, in interstate commerce. Persons so engaged in business on January 1st, 1940 (some 8 months before the Act was approved), were granted "Grandfather Rights", entitling them to receive their certificates or permits automatically.*

> "Sec. 309.(a) Except as otherwise provided in this section and section 311, no common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission: *Provided, however,* That, subject to section 310, if any such

* The sections of Part III are referred to herein by the numbering used in the original official printing of the Act and adopted by the Commission and the District Court in their opinions; and copies of the original printing will be handed to this Court at the time of argument.

carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. * * *"

Section 309(f) contains similar provisions for permits to persons engaged in the business of contract carriers by water, with similar "Grandfather Rights".

No other persons are required by Part III to obtain certificates or permits from the Commission.

In the absence of any statement to the contrary, the references to persons who were engaged in the business of common and contract carriers before the Act was passed plainly indicate that Congress was not creating any new categories, but was merely regulating common and contract carriers by water as known and defined previously to the Act.

The definitions of common and contract carriers in Section 302, (c), (d) and (e), add nothing to the common law definitions, under which the courts have consistently held that an independent tower is not a carrier.

Section 302 (f) (g) and (h) describe the transportation facilities which, when furnished and used by the carriers, shall be included in the scope of the Commission's regulation.

Towage services, even when performed for carriers subject to the Act, are specifically excluded by Section 303 (f) (1) and (2), and part III contains no other mention of towers, tugs, or towage services.

The other sections of Part III specifically relate to "carriers" of passengers or merchandise in the usual legal and business sense. For instance, Section 303 exempts various types of carriage, such as bulk cargoes, liquid cargoes in tank vessels, carriage not in competition with rail carriers, etc. Section 318 provides that "no common carrier by water shall deliver or relinquish possession at destination of any freight transported by it" except upon payment of charges, etc. Section 306 relates to the tariffs and schedules of rates for passengers and merchandise to be filed by the carriers. Other sections of Part III contain various administrative provisions with respect to the Commission's regulation of the "carriers".

In several instances, Congress, in Part III, expressly narrowed the regulation of water carriers as compared with rail and motor carriers, as in the exemption of bulk cargoes and liquid cargoes in tank vessels, Sections 303(b), (c) and (d), and in the exemption of transportation by water between states when performed within the limits of a single harbor or between places in contiguous harbors, Section 303(g). And nowhere is that differentiation more plainly stated than in the special definitions of interstate commerce for water carriers, in Section 302(i), of which the clauses which are material to the present matter are:

> "302(i) The term 'interstate or foreign transportation' or 'transportation in interstate or foreign commerce' as used in this part, means transportation of persons or property——
>
> "(1) wholly by water from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States."

4. The proceedings below:

Shortly after the passage of the Act, the Commission's Bureau of Water Carriers announced an administrative ruling that independent towers were considered to be carriers and therefore subject to Part III. The appellant, disputing the Bureau's interpretation of the language and intent of the Act, filed an application, under protest, for a contract carrier permit under Section 309(f), expressly reserving its contention that it is not a carrier (R. 71-79): and at the same time appellant filed a petition for a dismissal of the application, on that ground. (R. 11-16.) That procedure was adopted at the suggestion of the Bureau, in order to obtain a final ruling on the questions in dispute. The petition also asked the Commission to find that towages between points in New York State are not interstate. (R. 12.)

A. Before the Commission's Examiner.

Examiner Wilkins, after receiving the uncontradicted testimony of the appellant's operations as an independent tower, filed a report recommending that a permit be issued to your appellant authorizing the "continuance" of its operations, as a contract carrier. (R. 16-24.) The Examiner, ignoring the fact that persons,—and not vessels,—are to be regulated under Part III, considered that towboats are instrumentalities of transportation, and that towage

of a "carrier's" barge amounts to transportation of the barge and its cargo,—e. g., that the tug "carries" the barge and any cargo in it. The Examiner made no attempt to reconcile his conclusions with the established law that "towage" is not "carriage". As to the appellant's status in interstate commerce, he gave no specific consideration to the application of Section 302 (i) (1) to towage services between points in New York State.

B. Before Division 4.

On exceptions to the Examiner's report, Division 4 (Commissioners Porter, Mahaffie and Miller), concluded that your appellant should be certified to "continue in business" as a common carrier. (R. 24-44.) In effect, Division 4 held that Congress intended the Commission to include in the category of "carriers", for regulation under the Act, persons who are not "carriers", without altering their non-carrier status when sued in court for damages. (R. 32-33.) That bewildering conclusion was reached (1) by stating that the "non-carrier" status of towers had previously been established by the Courts only in suits for loss or damage (a statement which is inaccurate) and (2) by interpreting Section 320(d) as giving the Commission a free hand in reaching its own classification of "carriers", while preserving to any person regulated by the Commission his rights and status before the Admiralty Courts under the maritime law.

On the question of interstate commerce, although towages between points in New York State are not "from a place in a State to a place in another State," Division 4 concluded that Congress intended Section 302(i) (1) to receive the interpretation previously given to the definition of interstate commerce provided for rail and motor carriers (in spite of the specific difference in language), and held that

the possible passage of appellant's tugs through waters of the lower end of the Hudson lying over the New Jersey boundary line, when performing services between points in New York State, should be deemed "interstate." (R. 37-39.)

C. Before the Commission, or re-argument.

On re-hearing before the full Commission (nine Commissioners sitting, to wit: Commissioners Aitchinson, Lee, Porter, Miller, Mahaffie, Patterson, Splawn, Alldredge and Johnson), Division 4 was affirmed,—four commissioners dissenting. (R. 45-58.) Commissioners Splawn and Patterson dissented on the ground that a tower is not engaged in the business of transportation or carriage under the established law, that nothing in Part III has changed the tower's status in law, and that a tower is not subject to the Act. (R. 55-58.) Commissioner Splawn also joined with Commissioners Johnson and Lee in concluding that towages between points in New York State are not interstate under the definition provided in Section 302 (i)(1). (R. 54, 56-57.)

D. Before the District Court.

On your appellant's petition to the Southern District of New York, under U. S. C. Title 28, Sections 41(27)(28) and 43-48 inclusive, to enjoin, set aside, suspend and annul the Commission's certificate and order, the District Court gave its approval to the interpretations, theories, and conclusions of the Commission, and dismissed the petition. (R. 123-136.)

5. The three issues now presented by the appellant.

A. Under the long established law, and within the meaning of the words as heretofore used by Congress, an inde-

pendent tower is not a carrier. There is nothing in the provisions of Part III to alter the appellant's status as a "non carrier". Therefore appellant is not subject to the provisions for the regulation of common and contract carriers.

B. The appellant's towage services between places in New York State are not "from a place in a State to a place in any other State", and therefore are not interstate under Section 302(i)(1).

C. If it can be found that Congress, by the provisions of Part III, intended to alter the non-carrier status of independent towers, and that such change in status is constitutional, they should be classified only as contract carriers.

FIRST POINT.

A TOWER DOES NOT ENGAGE IN THE BUSINESS OF A CARRIER, AND IS NOT A CARRIER, IN LAW AND IN FACT.

During the long period of development on inland waters like the Hudson River and also on the coastal waters, an important phase of water-borne traffic was the growth of carriers who contracted to transport merchandise and property upon their barges and similar craft without motive power. Such carriers found that they could carry more cheaply by hiring towage services, as required, from independent towers, like the appellant, rather than incur the expense of maintaining their own power. In that branch of water carriage, a most distinctive feature has lain in the fact that the carriers (barge owners) at all times retain the possession and custody of the merchandise upon their barges, through their barge captains and crews, and do not surrender it to the independent tugs.

The courts have consistently recognized the fact that an independent tower contracts to furnish his towage services without assuming any of the contractual obligations of a carrier to the vessels towed and their cargoes, that he therefore does not "engage in the business of a carrier" within the common meaning of the words, and that towage service is merely "the employment of one vessel to expedite the voyage of another." *Sacramento Nav. Co.* v. *Salz*, 273 U. S. 326, 328.

> "Decisions of this Court show that under a towage contract the tug is not a bailee of the vessel in tow or its cargo. * * *
>
> "The supplying of power by a vessel, usually one propelled by steam, to tow or draw another, is towage * * * The tug does not have exclusive control over the tow but only so far as is necessary to enable the tug and those in charge of her to fulfill the engagement. They do not have control such as belongs to common carriers and other bailees. They have no authority over the master or hands of the towed vessel beyond such as is required to govern the movement of the flotilla. In all other respects and for all other purposes, the vessel in tow, its cargo and crew, remain under the authority of its master; and, in emergency the duty is upon him to determine what shall be done for the safety of his vessel and her cargo. * * * A contract merely for towage does not require or contemplate such a delivery as is ordinarily deemed essential to bailment."
>
> *Stevens* v. *The White City*, 285 U. S. 195, 200.
>
> "It is a great misnomer to call the defendants common carriers, or carriers of any kind in relation to the business of towing boats. Nor are they bailees of any description; for the property towed is not delivered to them, nor placed within their

exclusive custody or control. It remains in the possession, and for most purposes in the exclusive care of the owners or their servants."

Wells v. *The Steam Navigation Co.*, 2 N. Y. 204, at page 208.

In the case of *Sturgeon Bay, etc., Co.* v. *Leathem*, 45 Northeastern Rep. 422, the Supreme Court of Illinois held that a canal company which was authorized by its franchise to charge tolls upon "all boats, vessels, steamboats and other craft used for the transportation of freight and passengers on the canal" did not have any authority to levy tolls upon steamtugs used exclusively for towing the vessels which carried the freight or passengers. At page 423 the Court said:

> "It is assigned as error by appellant that the trial court held as law in the decision of the case the following proposition: 'That under the provisions of the act of the legislature of the state of Wisconsin, under which the plaintiff is incorporated, the plaintiff was authorized to determine and fix the amount of tolls to be charged for the different classes of vessels named in the charter navigating the canal, provided such tolls were reasonable; and also held that this class includes steam tugs as well as other vessels, provided said steam tugs were in the carrying trade; but that they were not permitted to charge for steam tugs while towing vessels through the canal, or on the return trip after making such towage. That the plaintiff is not entitled to recover from the defendants for tolls upon such steam tugs.' The proposition held as law gave a correct construction to section 8 of the charter. The directors were empowered to regulate tolls and charges upon all boats, vessels, steamboats and other craft used for the transportation of freight and passengers on and

> along the canal. The reference here is to boats or vessels used for the purpose of carrying passengers or cargoes of freight. The evidence shows that the tugs operated by the appellees carried neither passengers nor freight, but were merely engaged in towing vessels having on board passengers or freight through the canal."

In *Coup* v. *Wabash etc. Ry. Co.*, 56 Mich. 111, in discussing the nature of a special contract by a railroad company to haul cars owned by a private company, the Court said:

> "It is a misnomer to speak of such an arrangement as an agreement for carriage at all. It is substantially similar to the business of towing vessels, which has never been treated as carriage."

In many of the larger seaports there are towing companies which specialize in furnishing tugs to assist seagoing vessels in docking or undocking. Only by a complete and unwarranted distortion of the common meaning of plain words could it be suggested that those towers are engaged in the business of a carrier by water, either "common" or "contract". Yet, there is no essential difference between those towage services and the towage services rendered by the appellant. Where one tower furnishes tug power to move vessels in or out of docks, the other furnishes similar tug power to move barges along the river.

In the footnote* hereto there are cited only a few of a long line of decisions in which the courts have uniformly

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* *Sun Oil Co.* v. *Dalzell Towing Co.*, 287 U. S. 291, 294; *Steamer Webb*, 14 Wall. 406, 414; *The Margaret*, 94 U. S. 494, 496; *The J. P. Donaldson*, 167 U. S. 599, 603; *Propeller Burlington*, 137 U. S. 386, 391; *The L. P. Dayton*, 120 U. S. 337, 351; *Turecamo* v. *United States* (2nd C. 1942) 125 F. (2d) 1001; *New Orleans etc. Towboat Co.* v. *United States* (5th C. 1936) 86 F. (2d) 53, 60; *The Eastern* (2nd C. 1922) 280 Fed. 711, 712; *Ten Eyck* v. *Director General* (2nd C. 1920) 267 Fed. 974, 977; *Aldrich* v. *Penn. R. Co.* (2nd C.

held that a contract of towage is not a contract of carriage, that a tower is not a common carrier, is not an insurer, is not a bailee of the merchandise on board the vessels towed, and is liable only for negligence in the performance of the towage services.

The Commission itself has reached the conclusion,—indirectly and perhaps unintentionally,—that "towage" is not "carriage", in its opinion in the matter of *Union Barge Line*, 250 I. C. C. 689, basing its opinion on facts which underlie the established law that a tower does not engage in the business of a carrier. In that matter, Union Barge Line, which is admittedly in business as a common carrier, applied for "Grandfather Rights", under Section 309(a), over its entire route on the Mississippi River and on the canal westward of New Orleans, known as the Gulf Intracoastal Waterway. It moves its own barges by its own tugs on the Mississippi, but contracts with Coyle Lines to tow its barges on the canal. The question was raised whether Coyle Lines is a "connecting carrier", and should have the "Grandfather Rights" for the canal, defeating Union Barge Lines's application for that area. The Commission decided that Union Barge Line was entitled to the "Rights" over the entire route and that Coyle Lines, in performing towage services, is not a connecting carrier. While the Commission sought to bring its ruling within the scope of "incidental services" referred to in Section 303(f)(2), the practical conclusion was that Coyle Lines was not en-

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1918) 255 Fed. 330; *The Ashwaubemie* (4th C. 1925) 3 F. (2d) 782, 783; *Southern Towing* v. *Egan* (4th C. 1910) 184 Fed. 275, 277; *The Hardy* (9th C. 1916) 229 Fed. 985, 986; *The Maurice R.* (E. D. N. Y. 1932) 3 Fed. Supp. 86, 89; *The Authentic* (S. D. N. Y. 1936) 15 Fed. Supp. 780, 781; *The Anita D.* (E. D. La. 1939) 28 Fed. Supp. 361, 363; *Mengel Co.* v. *Inland Waterways Corp.* (E. D. La. 1940) 34 Fed. Supp. 685, 690; *The Bellatrix* (3rd C. 1940) 114 F. (2d) 1004, 1007.

gaged in the business of a carrier when performing the towage services, and therefore was not a "connecting carrier". In the course of its opinion, the Commission said:

> "The transportation was under through rates fixed by Union without any agreement, negotiation, or consultation with Coyle Lines as to their amount or their division. The arrangement of Union with Coyle Lines was for the latter to move the loaded and empty barges at charges for the service quoted by Coyle Lines, which charges were arrived at wholly without reference to the through rates to be applied for the through transaction.
>
> "The contract of the shipper was with Union for the entire transportation. Union was the only carrier known to the shipper *** as to the transportation herein considered, the shipper looked only to Union for the through transportation, and Union assumed full accountability for the transportation and the safe delivery of the goods at final destination.
>
> "Union collected the freight charges for the entire transportation, and there is no evidence that the shippers or consignees ever dealt with Coyle Lines with respect to those charges.
>
> "Union supplied its own motive power for movement of the barges over certain of the waterways and contracted with Coyle Lines for towage of the barges on the canal. ***"

Congress, in defining common and contract carriers for purposes of regulation under Part III did not create any new categories but merely used the same common law definitions under which the courts have consistently held that an independent tower is not a carrier. Section 302(d)(d)(e).

In *The Propeller Niagara, etc.* v. *Cordes,* 62 U. S. 7, 22, this Court gave the following definition:

> "A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him from place to place."

In *United States* v. *Ramsey*, 197 Fed. 144, at page 146, the Court quoted the following definition from *Moore on Carriers:*

> "A common or public carrier is one who, by virtue of his business or calling, undertakes, for compensation, to transport personal property from one place to another, either by land or water, and deliver the same, for all such as may choose to employ him; and everyone who undertakes to carry and deliver, for compensation, the goods of all persons indifferently, is, as to liability, to be deemed a common carrier."

In *Allen* v. *Sackrider*, 37 N. Y. 341, the Court said at page 342:

> "The distinction between a common carrier and a private or special carrier is, that the former holds himself out *in common*, that is, to all persons who choose to employ him, as ready to carry for hire; while the latter agrees, in some special case, with some private individual, to carry for hire."

To the same effect are *Stephenson* v. *Binford*, 287 U. S. 251; *Dorr* v. *The New Jersey Steam Nav. Co.*, 11 N. Y. 485.

Earlier legislation by Congress with respect to transportation of merchandise and property by water has not applied to independent towers, because of their non-carrier status.

Section 3 of the Harter Act provided:

> "If the owner of any vessel transporting merchandise or property to or from any port in the United States of America, shall exercise due dili-

> gence to make the said vessel in all respects seaworth and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel. * * *"

In *The Murrell,* 200 Fed. 826, it was held that that Act did not apply to independent towers who furnish towage services to another owner's vessels. *The Murrell,* owned by Baltimore & Boston Barge Company, was towing the barge *West Virginia,* owned by the Eastern Coal Company, and the barge was loaded with cargo belonging to Austin Gove & Son, Boston. During the voyage the *West Virginia* and her cargo were lost through the negligent navigation of the tug *Murrell.* The owner of the tug denied liability, asserting that the tug was engaged in performing a contract to transport the coal, and that §3 of the Harter Act should apply. The Court found that the owner of the tug was furnishing towage services to the vessel of another owner and was performing only a contract of towage so far as the use of the tug was concerned; and that therefore the tug-owner could not defend under the Harter Act. The Court said, at page 829:

> "To say that the owner of the tug, in such a case, is 'engaged in transporting merchandise or property,' is to extend those words of the Harter Act so as to make them include what Congress never intended them to include. * * * There is nothing in an agreement by the owner of a tug to tow another owner's vessel which can be regarded as making the latter vessel or her cargo the cargo of the tug."

That decision was mentioned with approval in *Sacramento Nav. Co.* v. *Salz,* 273 U. S. 326, 331, where this Court

pointed out the distinction between a contract of towage and a contract of carriage. In *Bradley* v. *Lehigh Valley R. Co.*, 145 Fed. 569, the Court said at page 573:

> "In the *Nettie Quill*, 124 Fed. 667, a locomotive carried on a barge towed by that steamer was dumped overboard. There a bill of lading was issued by the steamboat, and the court, Toulmin, J., decided that the contract was one of affreightment, rather than of towage, and the Harter Act applied, but there can be no question of the kind here as the relation of the tug was one of towage."

Thus, in previous legislation Congress has been understood to use the word "transportation" synonomously with "carriage", relating solely to "carriers" in the established and generally understood meaning of the words, thereby excluding independent towers who are "non-carriers". There is nothing in the present Act to indicate that Congress used the words with any other meaning when it provided for the regulation of common and contract carriers in Section 309(a) and (f) of Part III, or that Congress tacitly intended to alter the long-established "non-carrier" status of an independent tower.

In the present case, both the District Court and the Commission predicated their opinions on what would seem to be a complete misunderstanding of the basis on which the courts have stated the "non-carrier" status of towers. The Court and the Commission held that that status has been fixed, only with respect to liability of towers in suits for damages,* and therefore is not controlling in interpreting the present Act. (R. 32-33; 47; 130.) Such an argument puts the cart before the horse. Liability of the towers

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* NOTE: The case of *Sturgeon Bay Co.* v. *Leathem*, 45 Northeastern Rep. 422, did not involve damages but a question of toll charges.

has always depended on their status, which has been fixed *by the character of the business which the towers contract to perform*, as the cases cited above plainly state,—not by the mere assertion of liability against them.

SECOND POINT.

AS THE NON-CARRIER STATUS OF INDEPENDENT TOWERS HAS BEEN WELL ESTABLISHED, HAS CONGRESS CONVERTED THEM INTO COMMON CARRIERS BY THE PROVISIONS OF PART III, AND WOULD SUCH A CONVERSION BE CONSTITUTIONAL, EVEN IF CONGRESS INTENDED IT?

These proceedings do not raise the question whether the business of independent towers is "affected with a public interest", which would justify their regulation by Congress. Nowhere in the Act has Congress authorized the Commission to regulate independent towers as such. The comments of the District Court regarding the law that there is no closed class or category of businesses affected with a public interest, (R. 129) have no bearing on the case. The question here is whether Congress has attempted to convert non-carriers into common carriers for purposes of regulation, and whether such an attempt would be constitutional, even if it could be spelled out from the provisions of the Act.

This Court has held that it is beyond the power of a state, by legislative fiat, to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, since that would be to take private property for public use without just compensation, in violation of the due process of law clause of the Fourteenth Amendment. *Hicklin* v. *Coney*, 290 U. S. 169; *Stephenson* v. *Binford*, 287 U. S. 251, 266;

Michigan Commission v. *Duke*, 266 U. S. 570; *Frost Trucking Co.* v. *R. R. Commission*, 271 U. S. 583; and *Smith* v. *Cahoon*, 283 U. S. 553. The infringement of rights would seem to be all the greater if an attempt were made to convert a non-carrier into a common carrier. The appellant does not understand that any later decisions of this Court have modified that basic principle. In other words, even if a business can be regulated by legislative fiat because it is affected with a public interest, the Legislature must regulate that business as such, and cannot convert it into some other type of business for the purposes of regulation.

The Commission was not free to reach its own conclusions herein as to the status of independent towers. Their non-carrier status was previously established quite as definitely as that of a banker or a lawyer. The question is whether Congress attempted to alter their status into that of common carriers by the provisions of Part III.

Throughout the provisions of Part III there is not the slightest reference to independent towers, nor is there any mention of tugs or towage services, with the single exception of Section 303(f) (1) and (2), where Congress provided that towage services would not be subject to the Act even when performed for carriers subject to the Act.

The Commission's attempt to regulate the independent towers has been predicated from the outset on the theory that, when Congress exempted towage services rendered to carriers subject to the Act, Congress must have meant that towage services would be subject to regulation when rendered to persons not subject to the Act: and the District Court, approving the Commission's argument, concluded that the exclusion in Section 303(f) would be meaningless unless towage generally were included in the provisions of Part III. (R. 129.)

The appellant respectfully urges that there is no justification for that conclusion. If Congress had really intended to make the drastic change of converting independent towers from non-carriers into common carriers, it is reasonable to assume that Congress would have said so in plain language, instead of leaving its intent to be spelled out by such a negative or backhanded interpretation of a single exemptive clause. A much more logical explanation of Section 303(f) is that Congress was indicating, as it indicated in other sections of Part III, that the Commission was to be more limited in regulating water carriers than in regulating rail carriers. In other words, incidental services to water carriers, which might have been deemed subject to regulation under the law applicable to rail carriers, as in *Union Stockyard etc. Co.* v. *U. S.*, 308 U. S. 213, were expressly exempted from regulation by that section of Part III.

To alter the long-established "non-carrier" status of an independent tower by converting him into a common carrier would involve a most drastic change in the tower's rights and liabilities. The appellant submits that an executive tribunal, like the Commission, has not the power to make any such drastic change, in the absence of plain language from Congress itself. As this Court said in *Brady* v. *Roosevelt S. S. Co. Inc.*, 317 U. S. 575, 581:

> "We can only conclude that if Congress had intended to make such an inroad on the rights of claimants, it would have said so in unambiguous terms."

Commissioner Splawn said in his dissenting opinion:

> "The undertaking of applicant herein is to render specific services and not to transport goods or property. In the absence of any clear language in the statute declaring towboats to be carriers, and the

doubtful constitutionality of such a declaration or construction, I would find that the common law rule still prevails, and that ordinary towage, such as performed by applicant, is not transportation or carriage, subject to Part III." (R. 56.)

THIRD POINT.

IT IS NOT THE OWNERSHIP AND OPERATION OF TUGBOATS, PER SE, BUT THE CHARACTER OF THE BUSINESS ENGAGED IN BY THEIR OWNER WHICH DETERMINES THE "NON-CARRIER" STATUS OF THE INDEPENDENT TOWER.

The appellant believes that this important distinction was overlooked by the Commission and by the District Court, more particularly in connection with the definitions in Section 302(f), (g) and (h) regarding transportation facilities.

It is wholly irrational to assume that Congress intended to put into the categories of common and contract carriers persons who do not carry anything, merely because they own and use vessels, warehouses, wharves, dockyards, and other "transportation facilities", or furnish incidental services (as the dockyard which repairs the vessels). As there are many carriers by water who own tugboats, piers, vessels, warehouses, dockyards, etc., and use them in the performance of their contracts of carriage, it is logical to assume that in Section 302(f), (g) and (h) Congress meant that the facilities and services described therein, when used or performed by *the carriers themselves,* would come within the scope of regulation of those carriers. The Commission has committed itself to that interpretation by its ruling in *Status of Wharfingers,* 251 I. C. C. 613, that even though a "wharf" is a transportation facility under Sec-

tion 302(g), an independent wharfinger, who carries nothing by water, cannot be deemed a common or contract carrier, subject to Section 309(a) and (f). As Commissioner Splawn said in his dissenting opinion in the present case:

> "We have found only carriers by water are subject to regulation under Part III even though transportation facilities may be furnished by other persons. See Status of Wharfingers, 251 I. C. C. 613." (R. 55.)

The mere ownership and use of tugboats by an independent tower, who does not contract to carry, does not constitute him a carrier. Such a tower should not be confused with those common carriers who own and use tugboats in performing their contracts of carriage.

Union Barge Line Corporation, 250 I. C. C. Rep. 689 (discussed above), is an illustration. *The Barge Line* is a common carrier. It performs its contracts of carriage over the Mississippi River route by loading the merchandise on its own barges and moving the barges by its own tugs. Its tugs are not performing contracts of towage, but are units of the Barge Line's equipment used in performing its contracts of carriage; whereas the tugs of Coyle Lines are performing only towage services when towing for Union Barge Line on the canal.

In *Sacramento Nav. Co.* v. *Salz*, 273 U. S. 326, a barge line was engaged in the business of a common carrier, entering into contracts with the public to carry merchandise and property on its own barges in tow of its own tugs. In the course of its opinion this Court squarely pointed out that the distinction between such a case and the ordinary case of independent towage service lay in the fact that Sacramento Navigation Company was a carrier engaged in performance of its contract of carriage, the use of its own tug

being merely incidental thereto, whereas an independent tower performs a contract of towage and not a contract of carriage:*

> "Towage service is the employment of one vessel to expedite the voyage of another. Here, while there was towage service, the contract actually made with respondent was not to tow a vessel but to transport goods, and plainly that contract was a contract of affreightment. * * *" (Page 328.)
>
> "Respondent contends that his view to the contrary is sustained by *The Murrell*, 195 Fed. 483, affirming 200 Fed. 826, and *The Coastwise*, 233 Fed. 1, affirming 230 Fed. 505. Some things are said in those cases which, if we should not consider the differences between them and the present case, might justify this contention. The most important of these differences is that in both cases it was held that contracts of towage and not of affreightment were involved. * * * Here, upon all the facts as we have just said, the contract upon which respondent must rest is one of affreightment, the obligation of which is to carry a cargo, not to tow a vessel." (Page 331.)

There is another method of inland water carriage, where the tugowner enters into an agreement with the barge owner to move the barges in consideration of a share of the freight moneys paid by the shippers. There the tug is not furnishing independent towage services, but the tugowner and barge owner are jointly engaged in the performance of a contract of carriage. An illustration of that method of operation is found in *The Hugh O'Donnell*, 22 F. (2d) 410. In that case, while considering the application of Section 3

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* Division 4, in its opinion, misstated applicant's reference to the *Sacramento Navigation Co.* case and both opinions of the Commission ignored the basic distinction between that case and the ordinary case of an independent tower. (R. 30, 47.)

of the Harter Act, the Court expressly recognized the distinction between such operation and an independent performance of ordinary towage services by saying:

> "If the tug had been engaged on a contract of towage pure and simple, perhaps it could be said that, having no interest in the transportation of the freight, she was not engaged 'in transporting merchandise or property' within the meaning of the statute."

Stimson Lumber Co. v. *Kuykendall,* 275 U. S. 207, illustrates the same proposition in connection with an unusual type of carriage. In that case respondents held themselves out as common carriers for the carriage of shipments of logs on one of the western rivers. They "carried" the logs, by attaching their tugs' lines to the floating rafts or clusters. This Court held that the respondents were not rendering towage services but were performing contracts of carriage, just as much as if the logs had been loaded on the decks of the tugs; and the Court expressly pointed out that its decision rested upon the facts of the peculiar business of carriage in which the respondents were engaged. The Court said at page 211:

> "They are common carriers, not because of legislative fiat, but by reason of the character of the business they carry on."

In all such methods of operation as those indicated above, the use of tugs is incidental to the fact that their owners are engaged in the performance of contracts of carriage and receive the goods into their possession under those contracts. The controlling factor is not the use of the tugboat, but the contractual character of the business of her owner.

In Sections 309(a) and (f) of Part III, Congress did not empower the Commission to issue certificates or permits to,

and thereby regulate, tugboats and tugowners, but only persons engaged in the business of common or contract carriers. A tower, who is not a carrier, does not come within those provisions.

FOURTH POINT.

THE DISTRICT COURT AND THE COMMISSION HAVE DISTORTED THE COMMON AND ACCEPTED MEANING OF PLAIN WORDS AS USED BY CONGRESS IN PART III.

In *United States* v. *Temple*, 105 U. S. 97, this Court said at page 99:

> "Our duty is to read the statute according to the natural and obvious import of the language, without resorting to the subtle and forced construction for the purpose of either limiting or extending its operation."

In *Rodenbough* v. *United States*, 25 F. (2d) 13, at page 15, the Court said:

> "In performing this responsible function courts are careful not to be led astray by definitions of single, unrelated words of a statute or by the refinements of lexicographers, but to adhere closely to the use of words in their commonly understood meaning and in immediate relation to their subject matter. Merchants Loan & Trust Co. *v.* Smietanka, 255 U. S. 509 * * *; Doyle *v.* Mitchell Bros., 247 U. S. 179 * * *; Eisner *v.* Macomber, 252 U. S. 189 * * *."

In *Westerlund* v. *The Black Bear Mining Co.*, 203 Fed. 599, at page 605, the Court said:

> "A decisive canon of construction here, however, is that when a word which has a known legal meaning

> is used in a statute it must be assumed that the term is used in its legal sense in the absence of an indication of a contrary intent."

In *Thorn* v. *Browne*, 257 Fed. 519, at page 523, the Court said:

> "When a legislative body selects and uses in a statute words or clauses which before the enactment of the law had acquired by judicial interpretation or common consent and use a well-understood meaning and legal effect, the legal presumption is that it intended that they should have that meaning and effect in the statute it enacts."

Instead of interpreting the words "persons engaged in transportation" and "carriers" as previously defined by the Courts, as used by Congress in earlier legislation, and as commonly understood in the business world, the District Court predicated its opinion on an isolated dictionary definition which is *contra* to the legal, legislative, and customary usage of the verb "transport".

> "Plaintiff literally 'engages in the transportation by water of * * * property * * * for compensation', which is the test under §302(c) and (d), for the dictionary tells us that, nautically, to transport is 'to haul a vessel by hawsers' and a barge is both a 'vessel' and 'property'." (R. 128-129.)

The definition referred to appears in Funk & Wagnalls 1935 Ed. No such definition appears in Webster's "International", the "Century", the "Oxford", Black's or Bouvier's dictionaries, which concur generally in their statements that the verb "transport" and the verb "carry" are synonymous and in their common usage involve the idea of conveying while supporting (*Webster's International Dictionary*).

The definition relied on by the District Court is not only unique amongst dictionary definitions, but is contrary to the common meaning, as accepted by the Courts. For in *The Murrell*, 200 Fed. 826, 827, it was expressly stated that neither the vessel towed nor her cargo is considered as the cargo of the tug,—the tug does not carry or transport either of them. The same commonly accepted meaning of the words is plainly expressed in all the decisions referred to in the First Point of this brief.

In the case of *Chicago, etc., Ry. Co.* v. *Petroleum Refining Co.* (E. D. Ken. 1930), 39 F. (2nd) 629, the Court pointed out that the words "carry", "convey" and "transport" are synonymous, and that there may be movement of an article which does not involve carriage or transportation. The Court said at page 630:

> "A movable article may be moved in two ways. The movement in one way is expressed by the words 'carry', 'convey' or 'transport'. These three words are synonymous and express the same idea. * * *
>
> The movement in the other way is expressed by the words 'pull', or 'draw', or 'push' or 'shove'. * * *
>
> Or, again, one may own a mule and a cart. He may hitch the one to the other and mount the mule and then start the mule moving. In such case the mule is carrying, conveying, or transporting the owner. It is not pulling or drawing him, but it is pulling or drawing the cart. It cannot be said that the mule is either carrying, conveying, or transporting the cart. * * *"

The District Court also distorted the meaning of Section 320(d) in sustaining the Commission's argument that that section authorized the Commission to "label" persons such as your appellant as common carriers for the purposes of the Act, even though they would not have the status of

common carriers before the courts. (R. 130.) Section 320(d) reads as follows:

> "(d) Nothing in this part shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this part."

Assuming, as your appellant contends, that Congress was intending to regulate only carriers by water as previously defined and recognized, there is no difficulty in understanding that Section 320(d) was intended to preserve to those carriers their rights and obligations under the maritime law of the United States, such as their obligations to comply with the navigation laws and their rights under the laws relating to limitation of liability, fire damage, etc. It is an extreme distortion of the clause to read into it an unlimited delegation of authority to the Commission to "label" as common carriers such persons as the Commission might see fit on the theory that those persons would retain their "non-carrier" status before the courts.

The District Court also distorted the provisions of Section 309(a) and (f) regarding "Grandfather Rights" by concluding that "clearly what Congress meant was that a person is entitled to such a certificate if, on the specified date before the enactment of the legislature, it had been engaged in activities which, after the statute went into effect, would constitute it a common carrier." (R. 130-131.) There is nothing in Section 309(a)(f) or in any other sections of Part III to support that conclusion. It is logical to assume that when Congress undertook to regulate common and contract carriers who were in *bona fide* operation as

such before the Act was passed, it was referring to those categories as they existed under the established law, and was not creating any new categories.

In conclusion, the District Court said:

> "It goes without saying that, since there is substantial evidence to support the Commission's finding, we must sustain it, whether or not we would have made that finding." (R. 131.)

The "substantial evidence" was apparently merely the interpretations which the Commission had placed upon the language of Part III of the Act by an unwarranted distortion of the plain meaning of the words. Your appellant believes that it is for the courts to determine whether the Act has been interpreted properly by the Commission, and that that duty is not fulfilled by finding that the Commission's interpretation, based upon unwarranted distortion of the language of the Act, should be approved, even though the courts may consider that the interpretation is wrong.

FIFTH POINT.

EVEN IF THE APPELLANT CAN BE SUBJECTED TO THE ACT, AS A CARRIER, ITS TOWAGES BETWEEN PLACES IN NEW YORK STATE ARE NOT INTERSTATE WITHIN THE PLAIN DEFINITION IN SECTION 302(i)(1).

Both the District Court and the Commission refused to accept the plain wording of Section 302(i)(1), and insisted that, in spite of its difference in wording, it should be interpreted to have the same meaning as the definitions in Parts I, II and IV of the Act. (R. 37-39; 48-53; 131-134.)

The definitions of interstate transportation for rail, motor, and freight forwarders in Parts I, II and IV contain specific language which, directly or indirectly, provides that transportation between places in the same state, but passing through another state, is interstate.*

But with respect to water transportation, Congress furnished the definition,—"wholly by water from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States." Part III, Sec. 302(i)(1).

The intent of Congress to put water carriers on a basis different from that of the other carriers is found in Section 303(g) where water transportation, even between different states, is exempted when performed within the limits of a single harbor or places in contiguous harbors.

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* The definition for rail carriers in Part I, sec. 1(2)(a), is:

"The provisions of this chapter shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply——

"(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State * * *"

The definition for motor carriers in Part II, sec. 203(a)(10) is:

"(10) The term 'interstate commerce' means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water."

The definition for Freight Forwarders in Part IV, sec. 402(a)(6) is:

"The term 'interstate commerce' means transportation (A) between a point in a State and a point in another State, whether or not such transportation takes place wholly within the United States; (B) between points within the same State but through any place outside thereof; or (C) from or to any point in the United States to or from any point outside thereof, but only insofar as such transportation takes place within the United States."

Commissioner Splawn, in his dissenting opinion, discussed the reasonable explanation of the special definition which Congress furnished for water carriers:

> "The conclusion in the report rests almost entirely upon the alleged similarity with the provisions of part I. This analogy is unsound because the exact routes of water carriers are indefinite as compared with railroads, particularly where the waterway constitutes a boundary, and because part I was not the result of a single enactment but rather the consequence of many statutes and much interpretation. In the enactment of parts II and IV, the Congress for the purposes of those parts, has specifically included within the definition of interstate commerce, transportation between points within the same State through another State. The failure to include a similar provision in part III can mean only that Congress intentionally limited jurisdiction to transportation between points in different States. This construction is also consistent with the fact that part III contains numerous exceptions and exemptions which are evidence of the Congressional intent to confer more limited jurisdiction than has been given in the other parts of the act." (R. 57.)

In its consideration of Section 302(i)(1), the District Court made two serious misstatements. It said:

> "It is true that this interpretation has been said (152 Fed. at 272) to be strengthened by the fact that §1(2) in Part I provides that jurisdiction over railroads shall not apply 'to transportation * * * wholly within one state.' But §303(h) in Part III similarly precludes jurisdiction, as to water carriers, over 'intrastate transportation' ". * * * (R. 132.)

> "Congress must be deemed to have known in 1940 that the courts had held that the language employed in Part I had precisely the meaning of the language

employed in Part II. Congress then had a choice of two methods of expressing the same intention; therefore no significance can be given to the fact that, when it enacted Part III in 1940, it selected the language which it had used in Part II." (R. 132.)

The words "wholly within one state" in §1(2) of Part I were a part of the definition itself and were the very basis of the interpretation that rail transportation would be interstate if not wholly within one state. No such words (in any form,) appear in the definition for water carriers in Section 302(i). The District Court's reference to 303(h) is an apparent error. If the Court meant to refer to 303(k), it is obvious from the text that that clause was not part of the definition of interstate commerce for water carriers, and what it referred to as "intrastate" would depend on the definitions in Section 302(i).

Congress in writing Part III, Section 302(i)(1) did *not* select or use the language of the definition in Part II, as the District Court's own quotations show. The fact that Congress, with the full knowledge of earlier definitions which the District Court imputed to it, saw fit to write an entirely new definition for Part III must have significance.

Over 95% of the appellant's annual towage services is performed between points in New York State. The appellant contends that those services are intrastate, and are not subject to regulation under Section 302(i)(1), even if appellant is to be held a carrier under Part III.

There is no evidence in the record that the appellant's towage services between points in New York City and other points in New York State on the Hudson River are performed outside of the waters of the State. Finding of Fact No. 6 of the District Court, that "the undisputed evidence is

• • • that most of its tows crossed into New Jersey waters for some seven or eight miles and were obliged to do so because for that distance the navigable channel of the Hudson River lies west of the New York-New Jersey boundary line", (R. 135), is not supported by any evidence and is contrary to the actual fact.

The Hudson River, above the point about opposite Hastings, New York, lies wholly within the geographical limits of New York State. Below that point, the easterly geographical boundary of New Jersey lies under the center line of the river. But the whole of the surface of the river opposite Manhattan is exclusively within the jurisdiction of New York, by Article 3 of the Treaty of 1833, between the two states. *Ferguson* v. *Ross*, 126 N. Y. 459; *The People* v. *Central R. R. Co. of New Jersey*, 42 N. Y. 283; *Carlin* v. *New York, New Haven & Hartford R. R. Co.*, 135 N. Y. App. Div. 876, 880.

Thus, the only stretch of the waters of the Hudson which is not wholly within the jurisdiction of New York State is the 7 or 8 miles, referred to by the District Court, between the upper end of Manhattan and Hastings. The official Government charts show that along that 7 or 8 mile stretch, the main and best channel is on the easterly or New York side of the center. There is no evidence that appellant's tugs navigate on the New Jersey side along that stretch,—much less is there any evidence that they are obliged to do so to follow the channel.

But if the tugs were to navigate on the New Jersey side of the stream, the towages between points in New York would not thereby become "interstate".

In *Cornell Steamboat Company* v. *Sohmer*, 235 U. S. 549, this Court ruled that plaintiff's towage services between New York City and other points in New York State

on the Hudson River are not interstate commerce, even though they may pass through portions of the river lying over the geographical boundary line of New Jersey. The Court said at page 560:

> "That interstate commerce is necessarily taxed is said to arise from the fact that the business of the Company is in fact interstate commerce, as shown by its additional return, from which it appears that vessels for up-river points on the Hudson River are taken by tows, which are made up at a stakeboat located at Weehawken, which is within the territorial limits of New Jersey, that these stakeboats are anchored in the river just below Weehawken ferry, and that the course up the river is in territory of New York and New Jersey. But transportation between the ports of the State is not interstate commerce, excluded from the taxing power of the State, because as to a part of the journey the course is over the territory of another State. *Lehigh Valley Railroad* v. *Pennsylvania,* 145 U. S. 192; *Ewing* v. *City of Leavenworth,* 226 U. S. 464, and see *Cincinnati Packet Co.* v. *Bay,* 200 U. S. 179, 183. * * * It is evident that the making up of the tows for the State ports in the river below Weehawken was for convenience in conducting domestic transportation.
>
> "We are of the opinion that commerce thus carried on is not interstate commerce, * * *."

In *Cincinnati etc. Packet Co.* v. *Bay,* 200 U. S. 179 in connection with a question whether a contract for the sale of certain steamboats operating between Cincinnati and other points in Ohio, on the Ohio river, contemplated an interference with interstate commerce, Mr. Justice Holmes said, at page 183:

> "It might be enough, perhaps, to answer the whole contention, that it does not appear on the rec-

ord that the contract necessarily contemplated commerce between the states. It would be an extravagant consequence to draw from *Hanley* v. *Kansas City Southern R. Co.*, 187 U. S. 617,—a case of a state attempting to fix rates over a railroad route passing outside its limits,—that the contract was within the Sherman Act because the boats referred to might sail over soil belonging to Kentucky in passing between two Ohio points. It may be noticed further that Ohio equally has jurisdiction on the river. Wedding *v.* Meyler, 192 U. S. 573.

Even without recourse to the definition of Section 302(i)(1) of Part III, appellant believes that its towage services between points in New York are not interstate commerce. "For commercial purposes the entire river may be considered the boundary line between the two states." (Dissenting opinion of Commissioners Johnson and Lee, R. 55.)

In any event, under the plain definition set forth in Section 302(i)(1) there is no reasonable basis on which to hold that these services are interstate.

SIXTH POINT.

IF PART III HAS ALTERED THE STATUS OF INDEPENDENT TOWERS TO THAT OF CARRIERS, THE APPELLANT SHOULD BE CLASSED ONLY AS A CONTRACT CARRIER.

As Division 4 found, on the undisputed evidence, over 85% of the appellant's business is done under time contracts with its customers, running from one to three years, 12% to 13% being miscellaneous business contracted for from day to day; and all of its business is done on separate agreements or contracts (R. 27). The appellant contracts

to furnish towage services to meet the special requirements or operations of each of its regular customers (R. 19). A form of appellant's special contract is in evidence (R. 110). The miscellaneous business is accepted only when offered on terms satisfactory to the appellant.

Certainly the appellant was not holding itself out as a common carrier on January 1st, 1940, eight months before the passage of Part III, because at that time it was doing business in the well-established status of a "non-carrier". And in offering its services on terms relieving it from liability for negligence, it was not contracting on a common carrier basis. There is no factual basis for the Commission's conclusion that on January 1st, 1940, the appellant was holding itself out to the public as a common carrier (R. 41; 48; 53-54).

The fact that the appellant has been in business so many years that it is widely known, or the fact that the appellant, like other business concerns, may be willing to contract for new business which is satisfactory to it and which it can conveniently perform on its "non-carrier" terms, do not justify a finding that appellant has been holding itself out as a common carrier.

If the independent towers have been converted into carriers by Part III of the Act, a classification as contract carriers would preserve, more closely, the rights on which they have built up their business over a long period of years.

Conclusion

1. If, as the appellant contends, it is not a common carrier and is not engaged in the business of a carrier, and is not subject to Part III of the Transportation Act of 1940, this Court should reverse the order of the District

Court and should enter an appropriate order to the end that the certificate and order of the Interstate Commerce Commission, dated February 2, 1943, and each and every part thereof shall be suspended, set aside and annulled and perpetually enjoined, and that the Commission be directed and enjoined to reinstate the proceedings before it and to grant the appellant's petition to dismiss its application, for lack of jurisdiction.

2. In the alternative, if this Court shall find and conclude that appellant is a carrier within the terms and provisions of Part III of the Transportation Act of 1940, the Court should find that appellant's towage services between points in New York State are not interstate transportation within the definition of Section 302(i)(1) thereof, and should also find that on the undisputed evidence the appellant should be classed only as a contract carrier under the said Act; and an appropriate order should be entered to the end that the Commission be directed and enjoined to reinstate the proceedings before it and modify its findings, certificate, and order, accordingly.

Respectfully submitted,

ROBERT S. ERSKINE,
Counsel for Appellant.

New York, N. Y., December 27th, 1943.

APPELLANT'S BRIEF

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Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 384.

CORNELL STEAMBOAT COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND NATIONAL WATER CARRIERS ASSOCIATION, INC.,
Appellees.

No. 385.

BOSTON TOW BOAT COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND NATIONAL WATER CARRIERS ASSOCIATION, INC.,
Appellees.

BRIEF ON BEHALF OF BOSTON TOW BOAT COMPANY, APPELLANT.

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Supreme Court of the United States.

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No. 385.

BOSTON TOW BOAT COMPANY,

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THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND NATIONAL WATER CARRIERS ASSOCIATION, INC.,

Appellees.

BRIEF ON BEHALF OF BOSTON TOW BOAT COMPANY, APPELLANT.

The Background of and Reasons for Boston Tow Boat Company's Participation in This Litigation.

Boston Tow Boat Company* (like Cornell Steamboat Company†) is a tower for hire. It operates a fleet of fifteen tugs. It tows and assists vessels on the New England coast and in Boston Harbor and other New England ports, and has done so for many years. It is not in fact or in law a carrier. It issues no bills of lading or other forms of agreement for carriage. It has never had (except in one instance) any direct relationship to the shippers of

*Hereinafter referred to as "this appellant."
†Hereinafter referred to as "Cornell."

goods laden on the towed *and carrying vessels.* It contracts merely to tow the cargo carrying vessels of carriers in order to expedite *their* movements and those of *their* cargoes.

This appellant's earlier proceedings before the Interstate Commerce Commission,* pursuant to the requirements of Part III of the Interstate Commerce Act (U.S.C. Title 49, §§ 901-923, incl.), are briefly reviewed in Article Fourth of its petition to intervene in Cornell's proceedings in the Southern District of New York (R. pp. 68, 69). On June 25, 1943, this appellant filed with the Secretary of the Commission a petition for rehearing before the full Commission, which was denied on August 2, 1943.

Meanwhile, on June 22, 1943, at the trial and argument of Cornell's suit before the statutory three-judge court in the Southern District of New York (now here on these appeals), this appellant intervened† in that proceeding in order to join with Cornell in contending (see Cornell's assignments of error 1 to 6, inclusive, R. pp. 139, 140) that, as a tower for hire, Cornell is not a carrier within the terms and provisions of said Act.

The facts and considerations upon which will be based a determination of this appellant's status as a carrier (if it is a carrier at all) are not now before this Court.‡ If,

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*Hereinafter referred to as "the Commission."

†This appellant's intervening petition was filed pursuant to authority contained in U.S.C. Title 28, § 45a (Judicial Code, §§ 212 and 213), providing (*inter alia*) ". . . that . . . corporations . . . who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; . . ."

‡On August 20, 1943 (and subsequent to the decision below in these proceedings), this appellant filed in the District Court for the District of Massachusetts a suit similar to that filed by Cornell

however, this Court should decide that Cornell is a carrier under this Act because of some particular fact or set of facts peculiar to Cornell's operations, this appellant reserves its right to contend that the facts underlying its own towing operations are such as to bring the question of its status outside the scope of that of a carrier.

Argument.

The basic issue whether or not towers for hire are carriers within the terms and provisions of the Act has been argued in Cornell's brief in its Points First to Fourth, inclusive.

This appellant is not concerned with the arguments advanced in the Fifth Point of Cornell's brief, since the problems there discussed are peculiar to Cornell and do not concern this appellant and its operations.

While this appellant has also contended in its suit now pending in the District of Massachusetts that, if a carrier at all, it is a contract carrier and not a common carrier, the facts underlying this appellant's towing operations are quite different from those underlying Cornell's operations; and this issue, as it concerns this appellant, will be pre-

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in the Southern District of New York, wherein this appellant alleged that the fundamental issue whether or not towers for hire are carriers within the terms and provisions of said Act would be considered by this Court in these proceedings. This appellant, however, prayed in said suit that, if this Court should determine, despite the arguments advanced on these appeals, that towers for hire are carriers within the terms and provisions of said Act, the District Court in Massachusetts would determine whether this appellant is a contract carrier (as it contends), or is a common carrier (as the Commission has ruled). Further prosecution of this appellant's suit in Massachusetts has since been held in abeyance by agreement of the parties, pending the decision of this Court in these proceedings.

sented and developed in due course before a statutory three-judge court in the District of Massachusetts.

This appellant considers that no good purpose would be served by repeating the arguments advanced under Points First to Fourth, inclusive, of Cornell's brief, even in paraphrase. It believes, however, that it may, without impropriety, call this Court's attention more fully to the language of the Act and the manner in which the Act should be construed. Moreover, this appellant desires to make clear that the fundamental question whether or not towers for hire are carriers under the Act is of the utmost importance to towers other than Cornell who have carried on the business of towing for hire for many years under long-established rules of business practice and of applicable law; and the courts should not impute to the Congress a purpose to cause a departure from such long-established custom and doctrine unless it can be clearly discerned from the language of the legislation that such a departure was intended to result from such legislative action, and then only if the legislation itself is such as to accomplish that purpose.

The District Court Erred in Holding and Ruling that Cornell is a "Carrier by Water" within the Meaning of the Act.

The court below apparently based its decision* upon certain interpretations placed by it upon the several sentences of definition in § 902 of the Code.† A careful reading of the Act does not support the decision below.

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*Paragraph 1 of the opinion (R. pp. 128, 129).

†In this brief, we have followed the U.S. Code section references ("900 series"), whereas, in Cornell's brief, the "300 series" of section references of the Act has been used. These two series are otherwise identical, *e.g.*: 902 is the same as 302, 905 as 305, etc.

The scope of the Act is set forth in said § 902, headed "DEFINITIONS."

The term "water carrier" is by subsection (c) defined as "a common carrier by water or a contract carrier by water." By subsections (d) and (e) a "common carrier by water" and a "contract carrier by water" are defined as persons engaged "in the transportation by water" of passengers or property. Subsection (h) provides that "The term 'transportation' includes the use of any transportation facility (irrespective of ownership or of any contract, express or implied, for such use), and includes any and all services in or in connection with transportation, . . ." Subsection (g) provides that "The term 'transportation facility' includes any vessel, [etc.] . . . used in or in connection with transportation by water subject to this chapter."

Note particularly that in subsections (c), (d), (e) and (f) the Congress employed the words "*mean*," *e.g.*: "The term 'water carrier' *means* . . ."; "The term 'common carrier by water' *means* . . ."; etc. On the other hand, in subsections (g) and (h) the word "includes" is used, *e.g.*: "The term 'transportation facility' *includes* . . ." and "The term 'transportation' *includes* . . ." (Italics supplied.)

In view of the discriminating use by the Congress of the language above cited, it is clearly apparent that subsections(c), (d), (e) and (f) are definitions; whereas subsections (g) and (h) are merely descriptions of transportation facilities and transportation, respectively, *used or performed by carriers*. Furthermore, in subsections (g) and (h) the word "transportation" is itself used as part of the description; and it is apparent that these sections were inserted for the purpose of including, within the meaning of "transportation," acts or services which might not otherwise be included, rather than for the purpose of com-

pletely defining the subject-matter. These subsections do not tell the reader what "transportation" is. They do tell him that it includes certain things. The reader is compelled to resort to the usual dictionary definition as a starting point for any attempt to determine what the Congress intended.

To transport anything, in the usual plain meaning of the word, is to carry it. Similarly, to carry it is to transport it; and carriage is the act of carrying, or transporting. These words have an interchangeable use.

In the brief submitted below by counsel for appellee National Water Carriers Association, Inc., it was suggested that the transitive verb "to transport" means "to haul a vessel by hawsers." This particular definition is found in the 1935 edition of Funk & Wagnalls New Standard Dictionary, which, in full, is as follows:

> "Transport (vt.) 1. To carry or convey from one place to another. (2) Naut. To haul (a vessel) about a harbor by hawsers. 2. To lift or exalt into a state of intense mental excitement or ecstasy; enrapture; ravish; carry away. (2) To carry beyond the bounds of moderation."

The court below apparently seized upon this definition as being most to its liking.

In Webster's New International Dictionary, Second Edition Unabridged 1942, this transitive verb is accorded five definitions, only the first of which is in any way applicable to the use of the verb "to transport" in the Act. It is:

> "1. To convey; esp., to carry or convey from one place or station to another, as by boat or rail; to transfer; as, to *transport* goods or troops."

In the Oxford New English Dictionary the first definition given of the verb "to transport" is "to carry, convey or

remove from one place to another." None of the other definitions can possibly be applied to the use of this verb in the Act; and in the exhaustive historical note to this verb the Oxford Dictionary does not even suggest the definition invoked by the lower court.

We assume that the source from which a word in current use is derived is still valid authority in considering a proper interpretation of such word. The verb "to transport" comes, of course, from the Latin *transportare*, which (literally translated) means "to carry across." The District Court's statement that "Nautically, to transport is 'to haul a vessel by hawsers'" (R. p. 129) entirely overlooks the fundamental fact that the vessel which is hauled (or towed) is the carrying vessel and the hauling vessel is not also a carrying vessel, merely because it hauls, when it carries nothing.

It will accordingly be observed that the lower court went out of its way to adopt a definition which would help to support its obviously desired interpretation of the Act.*

*In this connection see *Hoffman* v. *Palmer et al.*, 129 F. 2d 976; affirmed, 318 U.S. 109. That case involved an action against the trustees of the New Haven Railroad for wrongful death and personal injuries arising out of a grade-crossing accident; and, at the trial, a statement signed by the then deceased locomotive engineer was excluded because it had not been made in the "regular course of business." In the opinion of the Circuit Court of Appeals for the Second Circuit, which was also written by Judge Frank, it was held that the exclusion of this statement was proper, both under the common law and under the federal statute (U.S.C., Title 28, § 695) rendering admissible "any writing or record, . . . made as a memorandum or record of any act, transaction, occurrence, or event, . . . if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record. . . ." At page 983 the court said significantly:

> "The words, 'regular course of business', twice employed in the legislation, are not colloquial words but are words of art, with a long history, and, as we have observed, often there-

This is in violation of well-established rules of proper statutory construction.

To say that anyone who does any of the things which the Act includes as "transportation" must be a carrier subject to regulation under the Act leads to impossible conclusions. For example, since a transportation facility "includes" any vessel and any equipment of any kind used in connection with transportation, and since transportation "includes" the use of a facility and "includes" all services in connection with transportation, it might be argued that a ship repairman who uses an electric drill in making repairs to the engine of a vessel used in interstate commerce, or a carpenter engaged in repairing the caplog of a wharf where interstate cargoes are handled, is engaged in transportation and is himself a carrier subject to the Act. That such a result was not intended is obvious. *The Act has for its purpose the regulation of persons who enter into contracts of carriage and who deal with such members of the public as are shippers of goods.* This is patent from a careful reading of Part III and the repeated references to "property," "commodities," "bills of lading" and other language appropriate to shipments. When Congress said that transportation includes the use of a transportation facility and includes all services in connection with transportation and the handling of property transported, it meant the use of a facility by a person who

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tofore judicially interpreted. Consequently, they should be given that settled meaning when incorporated in a statute, absent a contrary legislative intention clearly expressed in the statute or in its legislative history."

Contrast this interpretation of legislative intent with that invoked in the case at bar.

In affirming that decision, this Court said at page 114 (in substance) that the "words of the Act" should be confined to "their historic meaning."

was otherwise a carrier, or the rendering of services and handling of property by a person who was otherwise a carrier. It can scarcely be contended that the ship repairman and the carpenter who have been adverted to are carriers subject to the Act. While a hasty or casual reading of subsections (g) and (h) might give the impression that they are engaged in transportation for compensation, still they are not in the ordinary meaning of the words engaged in transportation or in occupations which are usually considered to be carrier occupations; in short, *they are not carriers.*

From the foregoing analysis of the "definitions" the most that can be said on behalf of the appellees is that a "water carrier" is (1) a person engaged "in the transportation by water" of passengers or property, *i.e.*, a carrier; or (2) one engaged in transportation by water of passengers or property (*i.e.*, a carrier) who uses a transportation facility in performing its act of carriage. We concede that a tugboat is a "vessel . . . used . . . in connection with transportation by water . . ." and therefore a "transportation facility"; but we strenuously deny that a tugboat is a carrier merely because it is used by a carrier as a transportation facility. The use by a carrier of a transportation facility constitutes a part of the act of carriage performed by the carrier, and thus subjects the facility indirectly to regulation through the regulation of the carrier who uses the facility. It does not, however, make the owner of the facility a carrier subject to regulation directly. It does not make the owner of the facility a carrier when he is not engaged in the business of a carrier. It should be carefully noted that the certificate or permit provided for in the Act is not issued to a "vessel" or to a "transportation facility," but is issued to a person to "engage in the business of" a carrier.

In *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422 (1940), the Court said at page 428:

> "Freight cars are *facilities of transportation*, as defined by the Act. The railroads are under obligation, as part of their public service, to furnish these facilities upon reasonable request of a shipper. . . . They are not, however, under an obligation to own such cars. They may, if they deem it advisable, lease them so as to be in a position to furnish them according to the demand of the shipping public and, if the carriers do so lease cars, the terms on which they obtain them *are not the subject of direct control by the Interstate Commerce Commission.* If the carriers pay too much for the hire of such cars the Commission may, of course, refuse to allow them to reflect such excess cost in their tariffs. *The lessor of such cars to a railroad, however, is not itself a carrier or engaged in any public service.* Therefore its practices lie without the realm of the Commission's competence." (Italics supplied.)

Towers are virtually in the same relation to the owners of carrying vessels as the owners of freight cars are to the carrying railroads. The tower contracts with the carrier to tow its barge at a price, whereas the owner of the freight car (also a "transportation facility") agrees to let its car to the carrier (railroad) at a price. Moreover, the freight car actually carries the goods transported by rail; and yet its owner does not become a carrier by reason of the use of its freight car. *A fortiori*, the owner of a tugboat *which carries nothing* does not become a carrier by reason of its ownership of the tug or by the *use by a carrier of the tug* as one of several "transportation facilities."

Furthermore, every use of a tug as a "transportation facility" necessarily involves a carrying vessel, and therefore necessarily involves a carrier, who is himself sub-

ject to regulation. It is with that carrier only that the shipper deals in connection with a particular movement of his property; and the shipper is given adequate protection by the regulation of that carrier.

Nowhere in the Act does the Congress provide specifically for the regulation of towers as such, and whatever basis may be found in the Act for bringing them within its scope must be found in the subsections above referred to. Accordingly, unless a tower is included in a category to which is applied the term "water carrier" or "common carrier by water" or "contract carrier by water," it is obvious that the Congress did not include towers within the scope of the Act.

Towers for hire have never been regarded as carriers. They have not even been considered bailees of the vessels towed or of the goods laden on board the towed carrying vessels. A tugboat operator merely furnishes motive power for a non-self-propelled carrying vessel. A tugboat is, indeed, the transportation-facility equivalent of the wind, which was once largely used to propel sailing vessels over the water. It is nothing more.

True, the wind cost nothing, which was one advantage accruing to water carriers who carried by sail. The mere fact that the tower must be compensated by the carrier whose vessel he tows is not enough to cause the status of the tower to be converted into that of a carrier, since (as pointed out, *supra*) the amount of the tower's charge is automatically and necessarily reflected in the charge made *by the carrier to the shipper.*

Viewed in the light of the foregoing exposition, the Act *"means"* merely that common carriers and contract carriers by water are to be regulated by the Commission; that such carriers are persons who (either by holding out or under contract) engage in the transportation (*i.e.*, carriage) by water of passengers or property—in other words,

carriers; and that, in the course of such transportation by the carriers, the carriers may themselves use any transportation facility (such as a tugboat). The mere use, however, by a carrier of a tugboat, as one of several available transportation facilities, does not thereby endow the tugboat and her owner with the attributes of a carrier. Cf. *Status of Wharfingers,* 251 I.C.C. 613. The use by the carrying vessel of a towing facility to assist in getting the carrying vessel to her destination (which, after all, is the only reason for using a tugboat anyway) is the use of a transportation facility offered *by the carrier to the shipper* as an inducement to the shipper to forward his goods *via* that particular carrier rather than by another carrier.

The language of subsections (g) and (h) is so similar to that used in Part I of the Act that it is to be presumed that it was modeled upon Part I. The provisions of Part I are stated to apply to common carriers engaged in transportation of passengers or property. "Common carrier" includes all persons engaged in "transportation . . . as common carriers for hire." The Act then declares [U.S.C. Title 49, § 1 (3) (a)] that—

> "The term 'transportation' as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

The last clause of this section is in words substantially identical with the last clause of § 902 (h). Note also that the words "shall include" likewise connote a description

of the "facilities" which a person engaged in transportation as a common carrier for hire may use as part of *his* act of carriage.

Ellis v. *Interstate Commerce Commission,* 237 U.S. 434, (1915), involved the owner and maintainer of refrigerator cars which were supplied by the owner to the railroad or to the shipper for use in the transportation of perishable commodities. The car owner also operated icing stations and undertook to keep the cars iced in transit. It was argued that the person owning, maintaining and icing these cars was a common carrier because the definition of "transportation" included such activities. The Court said, at pages 443, 444:

> "It is true that the definition of transportation in § 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth."

The description of "transportation" in Part III is likewise "a preliminary to a requirement that the" carrier by water shall furnish such transportation within the limits of its holding out. Section 905 (a) of the Code so provides. The decision in the *Ellis* case is a clear holding that the ownership or operation of a transportation facility or the performance of a service within the category of "transportation" does not *ipso facto* bring the owner, operator or performer within the class of persons regulated as a carrier, but that a carrier otherwise subject to the Act is subject to regulation in all the elements that are "included" as a part of the "transportation" performed by him. The person who does something within the scope of "transportation" is not thus made a carrier unless in all

truth he was, apart from the element of "transportation," a carrier subject to the Act. The holding of the *Ellis* case has recently been approved by this Court in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, 428, *supra.*

To put it the other way, and with particular reference to Part III, the provisions of § 902 (g) and (h) delimit the extent of the activities of a "carrier" which are to be regarded as the transportation performed by him, and thus subject to regulation. The question whether or not he is a carrier is left to the common law. By that test a tower is not a carrier.

Conclusion.

This appellant submits that towers for hire (and these appellants as such) are not carriers, are not engaged in the business of carriers, and are not subject to Part III of the Interstate Commerce Act; and that this Court should reverse the order of the statutory court in the Southern District of New York and should enter an appropriate order to the end that the certificate and order issued by the Commission on Cornell's application dated February 2, 1943, and each and every part thereof, shall be suspended, set aside, annulled and perpetually enjoined; and that the Commission may be directed and enjoined to reinstate before it the proceedings involving Cornell and this appellant, and to take appropriate action thereon in accordance with the order of this Court.

Respectfully submitted,

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Office - Supreme Court, U. S.
FEB 22 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 384.

CORNELL STEAMBOAT COMPANY,

Appellant,

against

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and NATIONAL WATER CARRIERS ASSOCIATION, INC.,

Respondents.

REPLY BRIEF FOR APPELLANT.

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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 384.

CORNELL STEAMBOAT COMPANY,
Appellant,

against

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and NATIONAL WATER CARRIERS ASSOCIATION, INC.,
Respondents.

Appeal from the District Court of the United States for the Southern District of New York.

REPLY BRIEF FOR APPELLANT.

I.

The Government's brief wrongly asserts that the case of *Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 207, is authority for the contention that the status of towers as "non-carriers" at common law is no constitutional bar to their being considered common carriers for purposes of a regulatory act (Government's brief, pp. 20, 48), and that the status of towers under a regulatory act must be determined by the language of the particular statute rather than by any common law rule of liability (Government's brief, p. 34).

In the *Stimson Lumber* case, the decision rested upon the fact that the tug owners were not engaged in the business

of towing, but were engaged in the business of common carriers, the use of their tugboats being incidental to the performance of their contracts of carriage, and the manner of carriage of the logs (at the end of towing lines) being the equivalent of carrying the logs on the tugs themselves. This Court pointed out that the status of those tug owners was not determined by legislative enactment, but by the character of the business in which they were engaged. This Court said at page 211:

> "In all essential particulars, that service is like the carriage of freight in vessels. * * * The tariff filed by the Northwestern Tow Boat Owners Association shows that fifty owners held themselves out as engaged in the business of common carriers, including the towing of logs; * * * They are common carriers not because of legislative fiat, but by reason of the business they carry on."

That decision in no way altered the established law that an independent tower, who merely contracts to furnish towage services and does not contract to carry anything, is not engaged in the business of a carrier (Appellant's brief, pp. 11-17).

II.

The Government's brief, as at pages 18 and 34, contains statements to convey the impression that under the established law previously to the Transportation Act of 1940 independent towers were always carriers, but were merely "relieved from the strict rule of liability of a common carrier."

The status of independent towers under the established law does not rest on any such qualified basis. The

decisions of this Court and the lower courts were not confined to "relieving" independent towers from liability, but were based squarely on the proposition that independent towers who merely contract to furnish towage services are not engaged in the business of carriage or transportation under the common and accepted meaning of the words, (Decisions cited in the footnote of appellant's brief, pp. 14-15).

III.

The Government attempts to hurdle the established "non-carrier" status of the independent towers by arguing that the definitions in Section 302(c), (d) and (e) were intended to set up new categories of common and contract carriers different from those which had been generally understood under the common law definitions of the words (Government's brief, pp. 28-36).

Appellant submits that the definitions in Section 302(c), (d) and (e) do not differ in any material respect from the common law definitions as previously stated by the courts (Appellant's brief, p. 17). Indeed, the brief filed by the Government before the United States District Court in this proceeding contained the following admission (p. 48):

> "The definitions of common and contract carrier in Part III, sec. 302(d) (e) are those of the common law. * * *"

And the provisions in Section 309(a) and (f), granting "grandfather rights" to persons who were engaged in the business of common and contract carriers on January 1st, 1940, some eight months before the Act became law, indicate that Congress was referring only to common and contract carriers as generally understood previously to the

Act, under the established law, and was not creating any new categories.

IV.

The Government's brief, in the footnote to pages 30-31, quotes from the Congressional Record a statement which is alleged to support the contention that Congress regarded all independent towers as carriers. The statement does not support that contention. It will be noticed that the statement referred to carriers operating on the Mississippi River, and the carriers on that river perform their contracts of carriage by means of their own barges and tugs, as described in *Union Barge Line,* 250 I. C. C. 689. The use of their own tugs by such carriers in performing their contracts of carriage is to be distinguished from towage services performed by independent towers who carry nothing (Appellant's brief, pp. 28-37).

V.

Throughout the Government's brief there is an underlying argument that the questions raised by the appellant should be determined on the assumption that Congress intended the provisions of Part III of the Act to place water-carriers upon an equality of regulation with rail and motor carriers. The numerous exemptions and limitations expressly set forth in the provisions of Part III squarely negative that argument. In fact, the Commission itself, in its 57th Annual Report of November 1st, 1943, made the following statement:

> "Both from the facts of record in decided and pending applications and from preliminary investiga-

> tions pursuant to Section 304(b), it has become apparent that the extent of our jurisdiction is limited to a small portion of the total transportation by water performed in the United States."

That Congress intended such result and did not intend to put water carriage on an equality of regulation with other forms of carriage is not only indicated in the provisions of Part III, but was also indicated by Senator Wheeler in his report to the Senate (Congressional Record, September 9th, 1940, pp. 11766 and 11768).

> "The Senate bill contained certain exemptions from the regulation proposed for water carriers *** The conferees felt that these more liberal amendments should be adopted at this time, on the theory that, if experience should show that more extensive regulation is necessary, that can be accomplished at a future time."

VI.

The foregoing comments also emphasize the error in the Government's underlying argument that regulation of water-carriers, in order to be effective, must be all-inclusive, and therefore Congress should be assumed to have intended to bring independent towers under regulation. Congress (expressly) did not intend the provisions of Part III to be all-inclusive with respect to persons furnishing incidental services to the carriers.

The Commission's assertion of its "all-inclusive" argument in the effort to subject to regulation persons other than those specified by Congress is not a sound or just basis for determining the appellant's right to protest regulation

which has not been enacted by Congress itself and which has not been delegated to the Commission by the provisions of Part III.

Respectfully submitted,

Robert S. Erskine,
Counsel for Appellant.

New York, N. Y., February 21st, 1944.

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Nos. 384 and 385

In the Supreme Court of the United States

OCTOBER TERM, 1948

CORNELL STEAMBOAT COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

BOSTON TOW BOAT COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 384

CORNELL STEAMBOAT COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL.

No. 385

BOSTON TOW BOAT COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion, findings of fact, and conclusions of law of the specially constituted district court (R. 123–136) are not yet reported. The reports of Division 4 of the Interstate Commerce Commission (R. 24–43) and of the full Commission

(R. 45–58) dealing with the Cornell Steamboat Company (hereinafter referred to as Cornell), appellant in No. 384, appear in 250 I. C. C. 301 and 250 I. C. C. 577. The report of Division 4 dealing with the Boston Tow Boat Company, appellant in No. 385, appears in 250 I. C. C. 743, but is not part of the record before this Court.[1]

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[1] The Boston Tow Boat Company sought permission and was permitted to intervene in the suit instituted by Cornell, solely for the purpose of asserting its general contention that towers were not common carriers by water subject to the Interstate Commerce Act (R. 68–70). Although Division 4 of the Commission on May 22, 1943, had held the Boston Tow Boat Company to be a common carrier by water and granted it a certificate of public convenience and necessity to continue operations as such, this order was not directly attacked in the present suit and the record before the Commission upon which the order was based was not introduced before the court. The court's decree (R. 136–137) likewise does not purport to deal with the Boston Tow Boat order. In fact, the court would not have had jurisdiction to do so, since the order of the full Commission denying Boston Tow Boat's petition for reconsideration was not entered until August 2, 1943, subsequent to the court's decision in the *Cornell* case. Under Section 17 (9) of Part I of the Interstate Commerce Act (49 U. S. C. 17 (9)), such an order is a jurisdictional prerequisite to a suit to set aside an order of the Commission. Furthermore, the Boston Tow Boat Company has directly attacked this order in another suit in the United States District Court for the District of Massachusetts, *Boston Tow Boat Co.* v. *United States*, Civil No. 2448, which is being held in abeyance pending the outcome of this case. It is evident therefore that the position of the Boston Tow Boat Company in the present appeal is virtually only that of an *amicus curiae*. Consequently, this brief will not deal further with the facts relating to the Boston Tow Boat Company.

JURISDICTION

The final decree of the district court was entered July 30, 1943 (R. 136–137). Petitions for appeal were filed by Cornell (R. 138) and by Boston Tow Boat Company (R. 141) on August 10, 1943, and August 30, 1943, respectively. The appeals were allowed on the same dates on which the respective petitions were filed (R. 137–138; 141–142). The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (28 U. S. C. 47a); Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, par. 4 (28 U. S. C. 345); and Section 316 (a) of the Interstate Commerce Act, Part III, c. 722, 54 Stat. 946 (49 U. S. C. 916 (a)). Probable jurisdiction was noted by this Court on October 25, 1943 (R. 147).

QUESTIONS PRESENTED

The ultimate question concerns the validity of an order of the Interstate Commerce Commission subjecting Cornell to its jurisdiction under Part III of the Interstate Commerce Act (49 U. S. C. 901–923) as a common carrier by water, and granting it a certificate of public convenience and necessity to continue operations as such.

Subordinate questions are:

1. Whether the Commission properly held that Cornell, to the extent that it is engaged in towing

for hire cargo-carrying vessels of others, not themselves common carriers, is "engaged in transportation by water" and is a "water carrier" within the meaning of Part III of the Interstate Commerce Act.

2. Whether the Commission properly held that as to such operations Cornell was a "common carrier by water" and not a "contract carrier by water" within the meaning of the Act.

3. Whether, if the Act is construed as designating Cornell a "common carrier by water," it is within the constitutional powers of Congress.

4. Whether the Commission properly held that Cornell's operations are in "interstate commerce" within the meaning of the Act.

STATUTE INVOLVED

The pertinent provisions of Parts I, II, and III of the Interstate Commerce Act are set forth in the Appendix, *infra*, pp. 61–75.

STATEMENT

By application filed with the Commission on May 21, 1941, Cornell sought a permit under the so-called "grandfather" clause of Section 309 (f)[1] of Part III of the Interstate Commerce Act (49 U. S. C. 909 (f)) to continue operations as a con-

[1] Section 309 (f) forbids contract carriers by water to operate without a permit issued by the Commission authorizing such operations as in the public interest. However, as in the provisions of the Act dealing with motor carriers, in this Section there is a "grandfather" clause, which authorizes the granting of a permit without fur-

tract carrier by water in towage service in interstate commerce from and to all points on the Hudson River between Waterford, New York, and New York City harbor points located in New York or New Jersey on the waters of the lower Hudson, and the adjacent waters of New York Harbor (R. 25, 74–82). The application prayed that if the facts showed that Cornell, although applying for a permit as a contract carrier, was entitled to a certificate as a common carrier, the application be treated as one for the appropriate form of authority (R. 25, 72). The application further stated that it was filed without prejudice to Cornell's contention that in its performance of towage services for hire it was not a carrier and did not carry or transport any passengers or property and that it was not subject to the Act (R. 25, 78).

On the same day, Cornell filed a petition to dismiss[4] its application on the grounds that in ren-

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ther proof of public interest to carriers who were in bona fide operation on, and continuously after, January 1, 1940. Section 309 (a) requires common carriers by water to secure certificates of public convenience and necessity from the Commission, but contains a similar "grandfather" clause.

[4] This procedure was apparently authorized under a general notice issued by the Commission on October 24, 1940, which stated:

> If water carriers are in doubt as to whether a certificate or permit is required for all or any part of their operations, they will be able to protect all rights by including such operations within the application, and the Commission's instructions will make

dering towage service, it was not a carrier and not engaged in transportation within the meaning of the Act, and therefore not subject to the Act (R. 11–12, 25). The petition further prayed that, without prejudice to its request for dismissal on those grounds, petitioner be held not subject to the Act insofar as its towage was performed wholly intrastate in the State of New York, irrespective of whether the vessels towed or their cargoes were moving in interstate commerce (R. 12, 25).

Rail carriers in official territory [4] and the Northeastern Inland Waterways Association, Incorporated, intervened at the hearing (R. 25). The Atlantic Coastwise and Inland Water Carriers Association, Incorporated,[5] and Mississippi Valley Barge Line Company were permitted to intervene

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it clear that this can be done without prejudice to any contention that they may wish to make that a certificate or permit is not required for such operations. [Commerce Clearing House, Federal Carrier Service, par. 14,102.]

Similar procedure has been followed with respect to railroad abandonment certificates. See *Piedmont & Northern Ry.* v. *United States*, 280 U. S. 469, 474. While the Commission's order was held not reviewable in that case, the subsequent decision of this Court in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 133–134, and its rejection of the "negative order" doctrine, clearly indicate that the present order is reviewable.

[4] For a definition of the scope of official territory, see *Iron and Steel Articles*, 155 I. C. C. 517, 520, fn. 3.

[5] National Water Carriers Association, Inc., the successor to this organization, intervened as a defendant before the district court and is an appellee here (R. 66–68, 128).

for the purpose of filing exceptions, and the Boston Tow Boat Company for the purpose of participating in oral argument (R. 25-26). Most of the intervenors contended that Cornell should be regulated as a common carrier (R. 26).

In its decision of June 15, 1942, Division 4 of the Commission reached the ultimate conclusion that Cornell "was in bona fide operation in interstate commerce as a common carrier by water of non-self-propelled freight-carrying vessels by means of towing vessels between all points within the limits of New York Harbor, New York and New Jersey, as those limits are defined in our order of March 26, 1941, entered in Ex Parte No. 140,* and on the Hudson River between New York Harbor and Waterford, New York, and all intermediate points; that such operation has been continued since that date; and that applicant is entitled under the 'grandfather' clause of section 309 (a) of the Act to a certificate of public convenience and necessity authorizing continuance of such operation, * * *." (R. 42-43). The division denied Cornell's petition to dismiss its application (R. 43), and an appropriate certificate was granted (R. 43, 44).

After written and oral argument, the full Commission, in its decision of February 2, 1943, affirmed Division 4's ultimate conclusion, except to

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* The Commission did not issue a report in this case.

the extent that it authorized operations between points within the limits of New York Harbor, as prescribed in the Commission's order in *Ex Parte No. 140, supra* (R. 53, 54). It was pointed out that, as to towage performed within the prescribed limits of New York Harbor, Cornell was not a party to any arrangement for the through carriage of barges or the cargoes therein from or to points without the State of New York (R. 53). Consequently, it was found that such transportation was within the terms of the exemption contained in Section 303 (g) [1] of Part III of the Act (49 U. S. C. 903 (g)), and that no certificate was required with respect to it (R. 53). A certificate, corrected accordingly, was issued, which authorized operations between points within New York Harbor

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[1] This section provides:

> Except to the extent that the Commission shall from time to time find, and by order declare, that such application is necessary to carry out the national transportation policy declared in this Act, the provisions of this part shall not apply (1) to transportation in interstate commerce by water solely within the limits of a single harbor or between places in contiguous harbors, when such transportation is not a part of a continuous through movement under a common control, management, or arrangement to or from a place without the limits of any such harbor or harbors, * * *.

The limits of New York Harbor within which Cornell's transportation was held to be exempt under the above Section were prescribed by the Commission in its order in *Ex Parte No. 140* (see p. 7, *supra*).

(New York and New Jersey) and Waterford, New York, and intermediate points on the Hudson River (R. 53, 58–59).

The pertinent facts concerning Cornell's operations as they appear from the report of Division 4 may be summarized as follows (R. 26–29):

Cornell was incorporated in 1878 to continue the towing business started in 1837 by the grandfather of its president. At the time of the hearing, it owned and operated a fleet of approximately 33 tugboats. One scow is maintained in connection with its regular equipment, but the company does not own or operate any barges or other type of carrying craft. No cargoes of merchandise or passengers are carried on any of the tugboats. The tugboats are used exclusively in towing for Cornell's customers, over 70 percent of whom are shippers who own or operate the scows or barges used in carrying their own merchandise. Other customers are water carriers. (R. 26.)

Cornell renders towing services the year around within the limits of New York Harbor, and harbors contiguous thereto, as those limits were defined by the Commission in its order of March 26, 1941, entered in *Ex Parte No. 140* (see pp. 7–8, *supra*). It also renders towing services on the Hudson River up as far as Waterford, New York, above Troy, New York, and the entrance to the Erie Canal, but those operations are suspended during the season when ice prevents them, which

is generally from the early part of December to about the middle of March. (*Ibid.*)

Cornell's records for the year 1940, which it considers fairly representative of its annual business for the past 10 years, show that 4.4 percent of its towing services were rendered between points in New Jersey adjacent to the lower Hudson River and points outside the harbor in New York State. However, much of the transportation between up-river points and harbor points in New York was also found to be in interstate commerce, for the New York-New Jersey boundary follows the middle of the river (4 Stat. 708) and would be crossed in navigating large flotillas of barges up or down the river. (R. 26–27.) See fn. 32, *infra*, pp. 51–52.

By far the largest part of Cornell's business is done on the contracts entered into for a period of years, while some contracts run for a single year, and the balance consists of miscellaneous contracts arranged from day to day. From 12 to 13 percent of its business is of the day-to-day type. Arrangements for all of its towing services, whether for a period of time or for an individual operation, are based on separate agreements or contracts. The vessels towed are scows which carry their cargoes on deck and barges which carry the cargoes below deck in the hold. Under the form of contract used, the shipper does not agree to make shipments; but if it does make

shipments, it agrees to employ Cornell's towage services, and to pay therefor at the rates stated in the contract, which are based upon the capacities of the barges described therein. If reductions are made by Cornell in the rates charged other shippers for like service, the contract rates are to be reduced to the same level; and if Cornell's fuel or labor costs are increased due to strikes or other causes beyond its control, the contract charges are to be increased provided the increases are also made effective as to other customers for similar services. Barges are not deemed to be in Cornell's custody or under its responsibility while lying at docks or not being actually towed. The term of the contract is stated, and provision is made for its continuance from year to year if not canceled at the end of the year. Such a contract, prior to the requirement of law for the publication of tariffs, served the same purpose as a common carrier published tariff, which fixes rates and conditions for future acceptance. In addition, it reserved to Cornell the sole right to tow such traffic covered by the contract as the shipper might decide to move by barge. (R. 27.)

In fixing its rates, Cornell's only interest in a cargo is with respect to the size of the scow or barge on which it is loaded, and the weight of the cargo which controls the load-water draft of the barge. Rates charged for towing are lower for

the larger units. For example, the rate per ton for towing a barge with a minimum of 1,500 tons is less than the rate per ton for a 300-ton-minimum barge. The rate is also lower if the scow or barge is towed with others in a flotilla. Cornell maintains a schedule for its customers under which a tow leaves New York Harbor daily for points as far north as Poughkeepsie, New York, and every other day for Albany, New York, and other points on the upper Hudson. This regular service is maintained under contract to meet the needs of certain customers. Other customers who can wait for their service until the regular flotilla is towed are given the benefit of the lower unit cost. In flotilla towing, the rates are the same to all customers for equal tonnages. If a customer desires individual service the rate is necessarily higher. From 85 to 90 percent of Cornell's business is in those flotillas. The flotilla may consist of from 5 to 50 barges. Cornell has practically no limit on such flotillas, but takes all that is offered and adds such additional tugs as may be required. (R. 27–28.)

No offer of towing services is advertised by Cornell in any daily papers or trade journals. Its witness, the company's president, thought that a simple announcement of towing services had been carried in Bullinger's Guide for many years. However, the 1939–1941 editions of that guide do not disclose any such announcement. Its busi-

ness has been built up with individual customers over the many years of its operation, and, as the witness said, "The business has been going on for so long that everybody knows it." Cornell has at times refused requests for towing services for various reasons, among which are the condition of the property to be towed, unsatisfactory credit, and when the requested service could not be rendered without injuring one of the regular customers. How such injury could result was not explained, and, in view of the evidence that there is practically no limit to the number of barges Cornell can include in a flotilla, the Commission found the above statement to be "unintelligible." Unless given a release from all liability, including liability for negligence, Cornell frequently declines to perform towage. (R. 28.)

Cornell does not issue bills of lading or similar documents with respect to the cargoes on the scows or barges towed. Each scow or barge has its own captain who looks after the safety of the vessel and its cargo. Neither the captain of the tugboat nor any other of Cornell's employees has anything to do with the cargoes on the vessels in the tow. Cornell generally has no interest in and no "official knowledge" of the origin or final destination of the cargoes, and when the towing service is complete with the docking of the vessel at the place agreed upon, no further services are rendered. No arrangements for any through move-

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ment, of which the towing services might be a part, are ever entered into by Cornell with any other carrier. It claims a lien on the barges towed for its towing charges, but no lien on the cargoes. When the barge is a chartered one, Cornell relies on the credit of the charterer. (R. 28–29.)

The report of the full Commission contains the following relevant discussion concerning the interstate nature of Cornell's operations (R. 51–53):

> At the reargument, and in its supplemental brief filed at that time, applicant, while admitting that the geographical boundary between New Jersey and New York follows the middle of the river (4 Stat. L. 708), urges that the State of New York has jurisdiction over the waters of the Hudson River lying west of Manhattan Island to the low-water mark on the New Jersey shore, under an agreement entered into by the two States in 1833. That agreement was ratified by the legislatures of the two States and approved by Congress. It fixes the boundary at the midde of the river and bay, but grants to the State of New York exclusive jurisdiction over all the waters of the Bay of New York and of the Hudson River lying west of Manhattan Island and to the south of the mouth of Spuyten Duyvil Creek to low-water mark on the New Jersey side thereof, subject to certain specified rights of property and of jurisdiction of the State of New Jersey, one of which is the

exclusive right of property in said to land under the water lying west of the middle of the bay and river; a second is that the State of New Jersey shall have exclusive jurisdiction over wharves, docks, and improvements on the shore of that State, and over all vessels aground or fastened to any wharf or dock on that shore, except that said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers of the State of New York; and another is the regulating of fisheries west of the middle of said waters. * * *

* * * * *

From the north end of Manhattan Island northward to the point where the northern boundary of New Jersey reaches the Hudson River is some 7 or 8 miles. Applicant therefore asserts that only for this distance would its traffic be outside the waters that are under the jurisdiction of the State of New York. It is not necessary for us to pass upon the question of whether the movement of applicant's traffic through the waters of the western half of the Hudson River lying west of Manhattan Island constitutes it interstate commerce, although this applicant in *Cornell Steamboat Co. v. Sohmer, supra* [235 U. S. 549], contended that it was such, since concededly movement through the waters of the western half of the river north of Manhattan Island is through waters under the jurisdiction of the State of New Jersey. The interstate

> character of applicant's traffic is determined, not by the number of miles that it moves outside the State of New York, but by the fact that it *does* move outside the State.

The full Commission also affirmed the principal subordinate findings of Division 3. Thus, it stated (R. 48, 53–54):

> The finding that towers engaged in interstate towing for the general public are subject to part III of the act, except to the extent that specific exemptions are provided, is affirmed.
>
> * * * * *
>
> We affirm the conclusion of division 4 that transportation between two points in the State of New York, passing through New Jersey territorial waters en route, is within the jurisdiction conferred on this Commission by part III of the act.
>
> * * * The evidence, as recited by the division, warrants the ultimate finding of fact that applicant holds itself out to the public to tow for anyone with ability and willingness to pay for the service, and the conclusion that such a holding out, accompanied by performance, constitutes one a common carrier.

Suit to set aside the Commission's order was instituted by Cornell against the United States and the Commission in the United States District Court for the Southern District of New York on

April 2, 1943 (R. 1). A specially constituted three-judge court, after final hearing at which the record before the Interstate Commerce Commission was introduced in evidence, issued an opinion written by Circuit Judge Frank, together with findings of fact and conclusions of law, on July 9, 1943 (R. 123–136). On July 30, 1943, it issued its final decree and judgment dismissing the petition (R. 136–137).

SUMMARY OF ARGUMENT

I

Part III of the Interstate Commerce Act, which was added by the Transportation Act of 1940, is modelled after Parts I and II, and precedents under those parts are therefore entitled to much weight in construing Part III. It is evident from the language and the legislative history of the Transportation Act of 1940 that Congress intended by that Act to achieve equality of regulation between railroads and competing forms of transportation. Towers by water compete with railroads and other forms of transportation, much as do other water carriers which actually carry cargo instead of towing the cargo-carrying vessels of others. Consequently, the regulation of towers must be considered to have been within the general Congressional purpose. The specific definitions contained in Part III clearly show that towers, though they furnish only motive power,

were subjected to the Commission's jurisdiction. Towers are engaged in "transportation" within the broad language of Part III, and even in the dictionary sense. Furthermore, the fact that Section 303 (f) (2) specifically exempts from the Commission's jurisdiction towage performed for common carriers, makes it plain that towage performed for shippers (such as that done by Cornell), which is not within the exemption, was intended to be included as "transportation."

Part III makes all those who either "hold out to the public" to engage in water "transportation" or engage in such "under individual agreements," "water carriers." It does not require that such persons shall have been considered common carriers at common law, and the fact that towers at common law were not subjected to the strict liability of a common carrier is of no significance here. Moreover, it appears from Section 320 (d) that Part III does not purport to modify any common-law rules of liability. Congress instead adopted substantially the same test to determine whether one was a "water carrier" as this Court had applied in determining whether one was a railroad carrier under Part I in *Union Stock Yard Co.* v. *United States*, 308 U. S. 213, 220–221, namely, whether the person engages in transportation as a "public calling." Since Cornell's towage is for shippers, it is engaged in a "public calling," and either

"holding out to the public to engage in transportation" or engaging in "transportation under an individual agreement." Consequently, it is a "water carrier" within the meaning of Part III. Numerous cases holding railroads to be common carriers engaged in railroad transportation under Part I and other federal regulatory Acts, though they furnished only motive power and no cars, also strongly support the conclusion that towers who are engaged in similar activities by water, are subject to Part III. *E. g., United States* v. *Brooklyn Eastern District Terminal*, 249 U. S. 296, 305; *United States* v. *California*, 297 U. S. 175.

The Commission's conclusion that Cornell held itself out to the general public to engage in transportation, and that it was therefore, under Section 302 (d), a common rather than a contract carrier is supported by substantial evidence. In view of this, and in view of the fact that the Commission employed the correct statutory test, its conclusion is binding upon this Court. The Commission, with judicial approval, has consistently held that a person does not engage in transportation "under individual contracts or agreements" and is therefore not a "contract carrier" under the Interstate Commerce Act unless he specializes either in the nature of the physical operations or in respect to the shippers served. *Doyle Transfer Co.* v. *United States*, 45 F. Supp. 691 (D. D. C.) Cornell does

not conduct specialized operations so as to make it a "contract carrier" under this test.

To construe Part III as subjecting Cornell to regulation as a "common carrier by water" is not to give it an unconstitutional construction. Neither the Act nor the Commission's construction does unconstitutional violence to common law conceptions of common and contract carriers within the theory of certain decisions by this Court holding that contract carriers cannot by legislative fiat be converted into common carriers and regulated as such. *Fordham Bus Corp.* v. *United States*, 41 F. Supp. 712, 715 (S. D. N. Y.); *Doyle Transfer Co.* v. *United States*, 45 F. Supp. 691, 696–697 (D. D. C.) In any event, more recent decisions of this Court have rejected the theory of these earlier cases, and held that there is no closed category of "business affected with a public interest" which can constitutionally be subjected to economic regulation. *Nebbia* v. *New York*, 291 U. S. 502; *Olsen* v. *Nebraska*, 313 U. S. 236. Likewise, the fact that at common law towers were regarded as "noncarriers" so far as liability was concerned, is no constitutional bar to their being considered common carriers for purposes of a regulatory Act. *Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 207, 211.

II

On the basis of Cornell's admissions, the Commission properly concluded that as a matter of

fact in operating between New York points Cornell frequently traversed the territorial waters of New Jersey. The Commission properly held also that transportation from one state through another state and back to the first state constituted "interstate commerce" within the meaning of Part III. Such transportation not only falls within the literal definition of "interstate commerce" in Part III, but has long been held by the Commission and the courts to be such within the meaning of the virtually identical provisions of Part I. *Missouri Pacific R. R. Co. v. Stroud*, 267 U. S. 404; *United States v. Delaware, L. & W. R. Co.*, 152 Fed. 269, 271–272 (C. C. S. D. N. Y.). In view of the general legislative purpose in the Transportation Act of 1940 to promote equality of regulation between railroads and other forms of transportation, Part III must be given a construction consonant with that given Part I. The fact that in Part II Congress used different language showing more specifically that such transportation was considered "interstate commerce" for purposes of that Part does not indicate that a different result was intended under Part III. If any such result had been intended, the different language of Part I which had been judicially construed to mean the same thing as that found in Part II, would not have been employed in Part III. This Court's decision in *Cornell Steamboat Co. v. Sohmer*, 235 U. S. 549, that operations of

this same type by Cornell did not constitute interstate commerce excluded from the taxing power of New York is of no significance here, for state regulation rather than taxation of this same type of transportation has been forbidden as an unconstitutional burden upon interstate commerce. *Hanley* v. *Kansas City Southern Ry Co.*, 187 U. S. 617. Furthermore, the state's power to tax and regulate is not the terminal boundary of federal power under the commerce clause. *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 311; *Wickard* v. *Filburn*, 317 U. S. 111, 120–122.

ARGUMENT

I

THE COMMISSION PROPERLY CONCLUDED THAT CORNELL WAS ENGAGING IN "TRANSPORTATION" AND WAS A "COMMON CARRIER BY WATER" WITHIN THE MEANING OF PART III OF THE INTERSTATE COMMERCE ACT

A. CORNELL WAS ENGAGED IN "TRANSPORTATION" AND WAS A "WATER CARRIER" AS DEFINED IN PART III

Inasmuch as this is the first case to reach this Court relating to the provisions of Part III of the Interstate Commerce Act, added by the Transportation Act of 1940 (54 Stat. 898), it appears desirable, before considering the particular statutory provisions involved, to examine the scope of Part III generally. This Part imposes numerous obligations upon common carriers by water. They are required: to establish reasonable practices,

reasonable through-routes with other carriers, and reasonable, nondiscriminatory and nonprejudicial rates; to transport only at rates published in tariffs required to be filed with the Commission; and to secure certificates of public convenience and necessity in order to operate. Sections 305, 306 (a)-(d), 309 (a) (49 U. S. C. 905, 906 (a)-(d), 909 (a)). More limited obligations are placed upon contract carriers by water. They are required to file their contracts and schedules of minimum rates with the Commission and not to transport for lower rates than those named in the filed schedules; to establish reasonable minimum rates; and to secure a permit in order to conduct any operations. Sections 306 (e), 309 (f) (49 U. S. C. 906 (e), 909 (f)). The Commission is empowered, either upon complaint or its own motion, to enforce these obligations. Section 304 (e) (49 U. S. C. 904 (e)). Furthermore, it is empowered to regulate the transfer of certificates and permits; to prevent dual operations by the same persons as common and contract carriers unless such is found to be in the public interest; and, with respect to both types of carriers, to require, and prescribe the form of, periodical reports and accounts. Sections 310, 312, 313 (49 U. S. C. 910, 912, 913).

It is apparent from a comparison of these provisions and the definitions contained in Section 302 of Part III with those in Parts I and II

of the Act, dealing respectively with rail and water carriers, that the language of Part III is modelled closely after the language of the two earlier Parts. Consequently, judicial and administrative precedents construing these earlier Parts are entitled to great weight in construing Part III. The legislative history of the Transportation Act of 1940, furthermore, indicates that Congress intended just such a result.[8]

Also, it is evident, both from the language [9] and the legislative history [10] of the Transportation Act of 1940, that Congress intended by that Act to bring about equality of regulation between com-

[8] S. Rep. No. 433, 76th Cong., 1st sess., p. 4, states:

> The present provisions of the Interstate Commerce Act have been redrafted in what is considered a more logical and orderly manner so as to apply to the newly regulated carriers, saving so far as possible the existing language so that full advantage may be taken of the many interpretations, both judicial and administrative, which have been put upon the respective sections. * * *

[9] The declaration of policy contained in that Act (54 Stat. 899) states:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, * * * to encourage the establishment and maintenance of reasonable charges for transportation services, without * * * unfair or destructive competitive practices; * * *.

See also Section 303 (e), Appendix, *infra*, pp. 68–69.

[10] Congressional intent to secure equality of regulation between competing forms of transportation is manifested

peting forms of transportation. Congress felt that it was unfair to subject to regulation, as it had done in the past, certain forms of transportation, such as railroads and motor carriers, and to permit their competitors, such as water carriers, to continue to be unregulated. That Cornell and

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by the following statement contained in S. Rep. No. 433, 76th Cong., 1st sess., pp. 2–3:

> For many years it has been the view of keen students of the transportation problem that there has been no consistent national policy with respect thereto. One reason urged in support of that view is that while the principal haulers of traffic and passengers, the railroads, have long been strictly regulated—as have, since 1935, motortrucks and busses engaged in interstate transportation—other forms of transportation are developed at public expense and without supervisory regulation. The net result of such a policy is inequality between various forms of transportation. As has been so often said, in 1887, when the original act to regulate commerce was passed, directed to correct abuses by railroads, the railroads had a monopoly on transportation. In later years competitive forms of transportation have developed with such rapidity that no one now urges that there is any such monopoly. * * * It has also been urged, and it seems sound, that there is no equality in treatment when the railroads, and lately the motor vehicles, are strictly regulated, and other forms of transportation are regulated, if at all, to a much lesser extent.
>
> * * * Consequently the remaining remedy is to so extend regulation to competing forms of transportation, other than air, which only recently was placed under the Civil Aeronautics Authority, and retaining to each such lawful advantages as are inherent therein, so as to, as nearly as possible, equalize them and put them on a common footing, at least from a regulation standpoint. * * *

other like towers are an important competitive factor so far as railroads, motor carriers, and other water carriers are concerned can admit of no doubt."[11] It is also apparent that towers, in so far as they tow for shippers, compete with railroads and motor carriers much as do cargo-carrying water carriers. Regulation of the towage for shippers, who are not themselves carriers,[12] which constitutes the bulk of Cornell's operations, can be accomplished only through direct regulation of the tower, since the Act nowhere purports to regulate such persons for

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[11] The following testimony by Cornell's president so indicates (R. 100):

> Exam. WILKINS. The Commission would like to know what your competition is.
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> The WITNESS. I think that we are the best towers on the Hudson River. We have competition of all kinds.

It is also indicated by the fact that the railroads and various associations of water carriers appeared in opposition before the Commission, and one such association intervened as a defendant in the district court and is an appellee here (see fn. 5, 6, *supra*).

[12] The Commission pressed upon the status of only such part of Cornell's operations (R. 35, 43). It pointed out that its remaining operations, towage for other water carriers, might be exempt under Section 303 (f) (2) (Appendix, *infra*, p. 70), which provides that certain towage operations for water carriers shall be considered to be part of, and regulated in the same manner as transportation performed by the water carriers. But it pointed out that no determination could be made upon this record as to whether such operations fell within this exemption, "because applicant did not make a full disclosure of the facts with respect to such towage" (R. 43).

whom the towing is done. Merely in the light of these general considerations, it is plain that Congress intended towers such as Cornell to be regulated by the Commission under Part III of the Act.

Moreover, certain specific language of Part III requires the same result. Section 302 (c) states that the term "water carrier" means "a common carrier by water or a contract carrier by water." In Section 302 (d) and (e), "common and contract carriers by water" are respectively defined. The term "common carrier by water" is defined to mean "any person which holds itself out to the general public to engage in the transportation by water in interstate or foreign commerce of passengers or property * * * for compensation." The term "contract carrier by water" is defined to mean one who engages in the same transportation "under individual contracts or agreements." Section 302, in subparagraphs (f), (g), and (h), respectively, defines the terms "vessel," "transportation facility," and "transportation." "Transportation" is defined to include not only the "use of any transportation facility," but also "all services in or in connection with transportation." "Transportation facility" includes any "vessel," as well as "any other instrumentality or equipment of any kind, used in or in connection with transportation by water." "Vessel" is defined to mean "any watercraft or other artificial contrivance of whatever descrip-

tion which is used, or is capable of being, or is intended to be, used as a means of transportation by water."

Momentarily disregarding the question whether Cornell's operations are interstate, it is obvious first that though it furnishes only motive power, it does "engage in transportation of property" by water for compensation" within the above statutory language. Accordingly, Cornell's tugs are "vessels," as above defined. Being "vessels," or being "any other instrumentality or equipment of any kind, used in or in connection with transportation by water," these tugs are also a "transportation facility." Since Cornell in operating its tugs thus makes "use of [a] transportation facility," it engages in "transportation" within the meaning of the Act. And even if it could not be said that Cornell engaged in "transportation" under the foregoing theory, it still must be considered to be so engaged in that, in any event, it furnishes "services in or in connection with transportation." Furthermore, though Congress has meticulously sought to define "transportation" in its own broad terms, rather than to rely upon the common understanding of that term, it is apparent, nevertheless, that Cornell is engaged in transportation even in the ordinary dictionary sense of the word. For, as the Commission and the dis-

"It is to be noted that the Act uses the broad term "property," rather than a more restrictive term such as "merchandise." Certainly the barge of another is "property" within the meaning of the Act.

trict court pointed out (R. 35, 135-136), transportation is defined specifically in the nautical sense in Funk and Wagnalls Standard Dictionary to mean: "To haul (a vessel) about a harbor by hawsers."

The only specific reference to towage in Part III strongly buttresses the conclusion that the type of towage performed by Cornell is "transportation" subject to that part. Section 303 (f) provides that the provisions of this Part shall not apply:

> (1) to transportation by water by a carrier by railroad subject to part I or by a motor carrier subject to part II, incidental to transportation subject to such parts, in the performance * * * of * * * *towage;* but such transportation shall be considered to be transportation subject to part I when performed by such carrier by railroad, and transportation subject to part II when performed by such motor carrier.
>
> (2) to transportation by water by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to part II, or a water carrier subject to this part, in the performance * * * of * * * *towage;* but such transportation shall be considered to be performed by such carrier or express company as part of, and shall be regulated in the same manner as, the transportation by rail-

road, express, motor vehicle, or water to which such services are incidental. [Italics supplied.]

Cornell (Br. 21) describes this Section as exempting towage services "even when performed for carriers subject to the Act." Plainly, that is a misreading of the language. Rather, this provision exempts towage only when it is done by a rail or motor carrier or for a rail, motor or water carrier subject to the Act. As the district court stated (R. 129), this provision "which expressly excludes certain kinds of towage would be meaningless if towage generally were not included." The legislative history of this Section, furthermore, indicates that Congress thought that without this provision even towage performed for other carriers would be subject to the Act.[14]

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[14] As originally reported out to, and passed by, the Senate, the bill which ultimately became the Transportation Act of 1940 exempted towage performed for other common carriers. S. Rep. No. 433, 76th Cong., 1st sess., p. 8; 84 Cong. Rec. 5963. The bill when first reported to the House of Representatives contained a provision which exempted towage performed by a rail or motor carrier, but not towage performed by another for any other type of carrier. H. Rep. No. 1217, 76th Cong., 1st sess., p. 19. The language now found in Section 303 (f) (2) and excluding towage performed for other carriers, had its genesis in an amendment proposed by Congressman Wadsworth in the debates before the House (84 Cong. Rec. 9985-9986). The following statement clearly indicates that this Congressman thought that all those furnishing towage under the language as it then stood were common carriers by water (84 Cong. Rec. 9985):

Apparently, the Congressional desire to prevent such a result in that limited case was merely another manifestation of the same legislative intent

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Now I want to call the attention of the chairman of the committee to this situation and see if I am wrong about it. I doubt if the committee ever gave it any consideration. I will have to cite an example of the practices of inland water carriers. For example, A and B are both common or contract carriers, as the case may be, subject to this act. A has a tow of barges bound downstream on the Mississippi River, and that tow is delayed by weather conditions. It may be a couple of days late. This same A also has in New Orleans Harbor a tow of, we will say, six barges already laden, waiting to be forwarded north-bound by the powerboat which is bringing the downstream barges with it, and which is 2 days late. A does not want to delay the upstream voyage of the barges he already has loaded in New Orleans.

He has no other towboat of his own except the towboat which is bringing downstream barges, which is 2 days late. What does he do? He communicates with another carrier named B, who has an idle towboat at New Orleans and he contracts with carrier B for the use of that towboat to start those barges, already laden in New Orleans, upstream to get them going on time. Then when the upstream load of barges meets the downstream load of barges the two towboats interchange and B's contracted towboat takes the downstream-bound barges back to New Orleans and the other towboat goes on upstream with the barges which left New Orleans on their way upstream.

This bill prevents that, and why it does I cannot understand, for this bill provides that B's towboat, which is contracted for by A, is itself a common carrier. As a matter of fact, it is merely hired for a special purpose for a short time, and

which this Court has found existed under Part II of the Act to prevent the accrual of multiple "grandfather" rights on the basis of a single transportation service. *United States* v. *Rosenblum Truck Lines,* 315 U. S. 50, 53–54. It may well be, as Cornell urges (Br. 22), that the effect of this provision is to give the Commission more limited jurisdiction over those performing incidental towage services for water carriers, than it has been held to have with respect to those performing other incidental services for railroad car-

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things like that are happening on the inland waterways hundreds and hundreds of times.

My amendment proposes to strike out this language, substitute new language which will limit the regulation at least within reasonable bounds, and it reads:

"Persons acting in the capacity as agents for common carriers by water, subject to this act, in providing towage floatage, lighterage, car, ferry, or transfer or terminal operations, shall not be deemed common carriers by water, but each such operation shall be deemed to be that of the carrier for which it is performed."

Though this proposed amendment was rejected at that time (84 Cong. Rec. 9986), on the next day Congressman Lea, in charge of the bill, offered amendments which were stated to be "in substance" the Wadsworth amendments and "to carry out the purpose we had in the discussion on the Wadsworth amendment" (84 Cong. Rec. 10112). These amendments which brought the language virtually into its present form, were then adopted. (84 Cong. Rec. 10112–13). This language was retained by the Conference Committee, except that it was placed in a different Section. H. Rep. No. 2832, 76th Cong., 3d sess., p. 83.

riers. Cf. *Union Stockyard Co.* v. *United States*, 308 U. S. 213. But that does not militate against the conclusion that towage performed for others than carriers, and thus not within the exemption, is not subject to the Act. Cornell's operations with which we are concerned here are of this latter type and therefore must be considered "transportation."[15]

Section 302 (e) furnishes evidence that Congress did not consider the actual carriage of goods in a particular vessel as an essential element of "transportation" in the statutory sense. That section provides that the furnishing of a vessel under charter to another, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute the person furnishing the vessel as engaging in transportation as a contract carrier. See Appendix, *infra*, p. 66.

We submit that it is now plain that Cornell does "engage in transportation" within the meaning of the Act. But both Cornell (Br. 23–24) and the Boston Tow Boat Company (Br. 8–14) urge that towers cannot be considered subject to Part III even though they do engage in transportation, unless they do so as "water carriers."

[15] Cornell's operations are totally unlike those considered in *Union Barge Line*, 250 I. C. C. 689, to which Cornell refers (Br. 15, 24). There, the towage was found to have been performed for a common carrier by water as an incident of the latter's transportation, and it was thus clearly within the exemption of Section 303 (f) (2).

And Cornell (Br. 11–20) contends that towers, who furnished motive power for the cargo-carrying vessels of others, were not considered, for certain purposes, carriers at common law, and therefore should not be considered subject to this Part.

It may be admitted at the outset that towers were not held by the courts at common law to the strict rule of liability of a common carrier.[16] Nor have towers generally been held to be within the provisions of Section 3 of the so-called Harter Act which limits the liability of "the owner of any vessel transporting merchandise or property."[17] However, as this Court has recognized, whether and to what extent a company is subject to a statute regulating the transportation activities of common carriers, must be determined by reference to the language of the particular statute, rather than by any common law rule of liability. *Stimson Lumber Co.* v. *Kuykendall*,[18]

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[16] *Stevens* v. *The White City*, 285 U. S. 195, 200; *The Margaret*, 94 U. S. 494; *The Webb*, 14 Wall. 406; *The Kunkle Bros.*, 211 Fed. 540 (N. D. O.).

[17] *The Murrell*, 200 Fed. 826 (D. Mass.); *Bradley* v. *Lehigh Valley R. Co.*, 145 Fed. 569 (S. D. N. Y.); cf. *Sacramento Navigation Co.* v. *Salz*, 273 U. S. 326.

[18] This case established the constitutional validity of a Washington statute regulating water towers of logs as common carriers. The Court there said (275 U. S. 207, 211):

> The rule that towboats not having exclusive control of vessels towed are not to be held to the strict liability of common carriers does not affect the question under consideration. * * *

275 U. S. 207, 211; *United States* v. *Brooklyn Eastern District Terminal*, 249 U. S. 296, 304; *Cleveland & St. Louis Ry. Co.* v. *Dettlebach*, 239 U. S. 588, 593. And, more specifically, the inappositeness of common law precedents dealing with the liability of towers, in determining their status under Part III of the Interstate Commerce Act, is indicated by the language of Section 320 (d) [19] of the Act.

As the district court appropriately observed in this connection (R. 130):

> * * * in § 320 (d) Congress showed that it had in mind the difference between the question of liability and that of regulation. By labeling persons such as plaintiff "common carriers" in this Act, they do not become such for all purposes. This is made clear by § 302 which, in so labeling them, expressly states that it does so "for the purposes of this Act." * * *

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[19] This section provides:

> Nothing in this part shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this part.

In view of this Section, and in view of the fact that Part III does not deal at all with the question of carrier liability except as to reparation awards in the case of carriers on the high seas or Great Lakes or via the Panama Canal (Sec. 308 (a), (b)), a finding that towers are subject to Part III would not affect their general liability for loss or damage.

The statutory definition of "water carrier" makes it very plain that Congress did not mean to limit the application of this Part to those who might traditionally have been considered common carriers. As we have pointed out, under the statutory definition, the term "water carrier" means a "common carrier by water, or a contract carrier by water." "Common carrier by water," in turn, means "any person which holds itself out to the general public to engage in the transportation by water," and "contract carrier by water" means "any person which, under individual contracts or agreements, engages in the transportation * * * by water." This language does not say that only those engaging in transportation as carriers, or as common carriers, as understood at common law, shall be subject to Part III. Instead, from this language it is manifest that Congress intended that all those who furnished transportation service to the general shipping public or some part of it should be considered subject to Part III as "water carriers." Congress, in effect, has adopted substantially the same test for determining who is a carrier subject to Part III, as this Court has applied in determining who is a carrier subject to Part I dealing with railroads.

Thus, in *Union Stock Yard Co.* v. *United States*, 308 U. S. 213, 220, this Court held that a company furnishing facilities for the loading and unloading of livestock at a public stockyard was engaged

in transportation by railroad, and that since such service was furnished as part of a *public calling*, the company was a carrier subject to Part I. The Court there distinguished (308 U. S. 213, 221) its earlier holding in *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434,[30] that a company leasing refrigerator cars was not a carrier subject to Part I, on the ground that the company was not engaged in a "public calling." It pointed out (308 U. S. 213, 220) that the character of the service in its relation to the public determines whether the calling is a public one. Inasmuch as Cornell's transportation is performed for shippers who own or operate the scows or barges used in carrying their own merchandise (R. 26), it is engaged in a "public calling," and also either "holding out to the public" or dealing "under individual contracts and agreements" with the shipping public, within the meaning of Part III. Consequently, it is either a "common carrier by water" or a "contract carrier by water,"[31] and in either event a "water carrier" subject to that Part. Such a holding is not at all inconsistent with the Commission's holding in *Status of Wharfingers*, 251 I. C. C. 613, that wharfingers were not subject to the Act despite the fact that they fur-

[30] The *Ellis* case was recently followed in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, 428–429.

[31] Whether Cornell is a "common" or "contract" carrier is discussed *infra*, pp. 39–46.

nished transportation service to the general public. As the district court pointed out (R. 129), the Commission reached that conclusion because the legislative history peculiar to wharfingers showed a clear Congressional intent that they be excluded.

Finally, numerous administrative and judicial decisions[22] under Part I of the Act and other federal regulatory Acts with respect to comparable situations concerning railroads, afford strong support for the Commission's conclusion that towers are "water carriers" engaged in "transportation." The *Union Stock Yard* case (308 U. S. 213), *supra*, presents a good example of a situation where a company which certainly did not carry anything in the traditional sense was, nevertheless, held to be a carrier within the meaning of Part I. Perhaps more pertinent are the several decisions of the Interstate Commerce Commission holding that switching-line companies furnishing only locomotives to haul the cars of others and having no cars of their own are engaging in railroad transportation as common carriers within the meaning of Part I. *Aluminum Corp. of America* v. *Massena Terminal Railroad Co.*, 69 I. C. C. 119; *New York Dock Ry.* v. *B. & O. R. R.* 73 I. C. C. 656; *Excess Income of Brooklyn East-*

[22] As previously suggested (*supra*, pp. 23–26), these precedents are very significant in construing Part III.

ern District Terminal, 94 I. C. C. 577. This Court has also held that the Brooklyn Eastern District Terminal was a "common carrier engaged in the transportation of property by railroad" within the meaning of the Hours of Service Act although "the thing which it undertakes to carry is contained only in cars furnished by the railroad companies." *United States* v. *Brooklyn Eastern District Terminal*, 249 U. S. 296, 305. Similarly, it has frequently been held that companies merely hauling the cars of others at an arbitrary charge per car are "common carriers engaged in interstate commerce by railroad" within the meaning of the Safety Appliance Act. *United States* v. *California*, 297 U. S. 175; *Belt Ry. Co. of Chicago* v. *United States*, 168 Fed. 542 (C. C. A. 7); *Union Stockyards Co. of Omaha* v. *United States*, 169 Fed. 404 (C. C. A. 8). See also under other Acts *United States* v. *Sioux City Stock Yards Co.*, 162 Fed. 556 (C. C. N. D. Ia.) ("28-hour law" dealing with the confinement of cattle before unloading); *McNamara* v. *Washington Terminal Co.*, 37 App. D. C. 384, 394 (Federal Employers' Liability Act of 1906).

B. THE COMMISSION'S HOLDING THAT CORNELL WAS A COMMON CARRIER RATHER THAN A CONTRACT CARRIER WAS CORRECT

As to whether Cornell was a common, rather than contract, carrier, Division 4 reached the following conclusion (R. 41), in which the full Commission concurred (R. 54):

> We find that the evidence discloses the fact of a general holding out tempered by prudence, a desire for business rather than a desire to exclude any. We find as a fact that applicant holds itself out to the public to tow for anyone with ability and willingness to pay for the service. Such a holding out, accompanied by performance, in itself constitutes one a common carrier.

It is obvious from this statement that the prescribed statutory formula for determining whether Cornell was a common or contract [*] carrier was applied in this case, for Section 302 (d) of Part III defines a common carrier by water as "any person which holds itself out to the general public to engage in the transportation by water * * *."

That there was substantial evidence in the record to support this conclusion is apparent from the following excerpt from the Division's report (R. 40–41):

> The test of a common carrier is whether it transports for the public generally. The evidence of record on that subject is, in part, as follows:

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[*] Section 302 (e) defines contract carriers by water as follows:

> The term "contract carrier by water" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation.

Question: Within the range of your operation, with credit considerations being favorable, contents of the barges being what you think they should be, will you tow for any one seeking your services?

Answer: We are like to, yes. [R. 98.]

* * * * *

Answer: We don't hold ourselves out at all. As a rule, we do take orders, as I mentioned. I think that 12 or 13 percent of our business is miscellaneous business. People will call up today and say that they want us to take a barge from here to there. We ask what kind of barge it is and how much it carries, and we give them a price, and we do that job. The rest is all by yearly or regular arrangements with customers, even down to the naming of the barge that they want towed. [R. 102.]

* * * * *

Answer: We have some on the blacklist, whom we do not tow, because we know that they don't pay. [R. 103.]

* * * * *

Question: But if there is some boat owner who may not have a yearly contract with you—and provided that the vessel and the cargo and the credit arrangement are satisfactory—you will tow his boat in that fleet?

Answer: Surely—if he gives us an order for it before the tow starts.

Witness [Cornell's president] further testified [R. 102] that in the tows that leave

New York nightly for up-river points "we have practically no limits; we take all that will come"; and explained that by "all that will come" he meant, "individual customers or people who have made arrangements with us. * * * We must have the order for the barge before the barges leaves the stake boat." [R. 102, 103.] He further testified that arrangements for a particular towing job could be entered into over the telephone, and upon inquiry whether such an arrangement would be entered into with persons with whom he had had no prior dealings, replied: "We would want to know something about them. If it was out of the blue, we would want to know who he was, and what he had to go, before we would give him a price." [R. 108.] Sometimes prepayment of charges has been required. [R. 108.] As to the breadth of applicant's willingness to transport: Witness testified that "Having been there since 1837, we pretty much know every manufacturer on the river. We go to him and ask him for a contract, and show him what kind of service we can give, and he gives us the contract." [R. 102.] And again, respecting the daily towing schedules: "The business has been going on for so long that everybody knows it." [R. 105.]

Since the Commission applied the correct legal test prescribed by Section 302 (d), and since its factual determination that there was a public holding out by Cornell is supported by substantial

evidence, the determination is binding upon this Court even though this Court might have reached a different conclusion. Cf. *Noble* v. *United States*, 319 U. S. 88. The district court so held (R. 131), and such is the familiar rule with respect to matters entrusted to determination by an administrative agency. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146; *United States* v. *Maher*, 307 U. S. 148, 153–154; *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546; *Alton R. Co.* v. *United States*, 315 U. S. 15, 23; *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 94.

It is suggested (Cornell Br. 38) that Cornell does not contract on a common carrier basis, since under its contracts it seeks to avoid liability for its negligence. But, as the Commission held (R. 40), and as this Court has often said, this is immaterial, since a person is a common carrier by virtue of his occupation, not by virtue of the responsibility under which he rests. *Liverpool & G. W. Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397, 440; *Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 207, 211–212.

Likewise, the fact that Cornell made separate contracts with each of its customers did not mean that its business was done "under individual contracts or agreements" so as to make it a "contract carrier" within the meaning of Section 302 (c) of Part III (see fn. 23, p. 40, *supra*). As the

Commission pointed out (R. 40), "The ordinary bill-of-lading issued by common carriers generally on every shipment transported is an individual contract covering the transportation of an individual shipment." The Commission has consistently construed the identical phrase, "under individual contracts or agreements" contained in the definition of "contract carrier by motor vehicle" in Part II as referring to specialization either in the nature of the physical operations or in respect to the shippers served. *N. S. Craig Contract Carrier Application,* 31 M. C. C. 705, 712;[24] *Doyle Transfer Co., Inc. Contract Carrier Application,* 32 M. C. C. 234, 236–237. This test was judicially sustained in *Doyle Transfer Co.* v. *United States,* 45 F. Supp. 691, 694–695 (D. D. C.) in which the Commission's decisions and the legislative history were

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[24] The Commission there said:

> The specialization which we have in mind may consist in the rendition of other than the usual physical services for the purpose of supplying the peculiar needs of a particular shipper, such, for example, as the furnishing of equipment especially designed to carry a particular type of commodity, the training of employees in the proper handling of particular commodities, or the supplying of related nontransportation services such as the assembling, placing, or servicing of machinery. Or it may consist of nothing more than the devotion of all of a carrier's efforts to the service of a particular shipper, or, at most, a very limited nomber of shippers, under a continuing arrangement which makes the carrier virtually a part of the shipper's organization.

carefully analyzed. See also *Fordham Bus Corp. v. United States*, 41 F. Supp. 712 (S. D. N. Y.). Furthermore, the Commission has employed the same test in determining whether one is a common or contract carrier under Part III. *Pontin Lighterage & Transportation Corporation Application*, 250 I. C. C. 441, 446; *Southern Transportation Co. Contract Carrier Application*, 250 I. C. C. 453, 455; *Moran Towing & Transp. Co. Inc., Applications*, 250 I. C. C. 541, 545). And the evidence here reveals that Cornell does not conduct specialized operations so as to make it a contract carrier within this test.

Cornell also urges (Br. 38) that at any rate it could not be considered to have been holding itself out as a common carrier on the "grandfather" clause date, January 1, 1940, since that date was several months prior to the adoption of the statutory definition, and at that time it was doing business in the well-established status of a "non-carrier." The district court effectively answered this argument when it said (R. 130):

> But clearly what Congress meant was that a person is entitled to such a certificate if, on the specified date before the enactment of the legislature, it had been engaged in activities which, after the statute went into effect, would constitute it a common carrier.
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> * * * * *
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> Note that the "grandfather" clause of Part II, as to motor carriers, § 206 (*f*), is

identical in language with § 309 (f) and see *Alton R. Co.* v. *U. S.*, 315 U. S. 15, 23; cf. *Fordham Bus Corp.* v. *U. S.*, 41 Fed. Supp. 712.

C. THE CONSTRUCTION OF PART III AS MAKING CORNELL A COMMON CARRIER BY WATER DOES NOT DEPRIVE IT OF PROPERTY WITHOUT DUE PROCESS OF LAW

The Commission's construction of the statute as making Cornell a "common carrier by water" does not, as Cornell asserts (Br. 20–23), render it unconstitutional so far as Cornell is concerned. Cornell's contention is based upon several decisions of this Court,[28] condemning, as in violation of the due process clause of the Fourteenth Amendment, attempts by legislative fiat to convert private contract carriers into common carriers and subject them to various forms of economic regulation more appropriate to common carriers. Also, it is stated that the general status of towers as "noncarriers" was so definitely established that Congress was without constitutional power to label them carriers for regulatory purposes.

In answer, it may first be said that Part III does not at all purport to convert that which was a contract carrier into a common carrier, unlike the situation in the above cases. The two categories are carefully preserved; they are subjected

[28] The decisions particularly relied upon are *Michigan Commission* v. *Duke*, 266 U. S. 570; *Frost Trucking Co.* v. *R. R. Commission*, 271 U. S. 583; *Smith* v. *Cahoon*, 283 U. S. 553.

to different degrees of regulation; and what is substantially the common law test of determining into which category a particular carrier falls is also preserved. In applying this test, the Commission held that on all the facts Cornell was holding out to the public to transport and was therefore a common rather then a contract carrier (Section 302 (d), (e)). Determinations by it under the identical language of Part II in which it differentiated between common and contract carrier much as it did here, have been held not to do unconstitutional violence to common law concepts within the theory of the cases upon which Cornell relies. *Fordham Bus Corp.* v. *United States*, 41 F. Supp. 712, 715 (S. D. N. Y.); *Doyle Transfer Co.* v. *United States*, 45 F. Supp. 691, 696-697 (D. D. C.). In any event, as the district court indicated in Judge Frank's opinion[*] (R. 129), subsequent decisions of this court in *Nebbia* v. *New York*, 291 U. S. 502, and *Olsen* v. *Nebraska*, 313 U. S. 236, involving economic regulation by the States, have rejected the theory upon which these earlier carrier cases cited by Cornell were based. These subsequent decisions establish that the category of "business affected with a public interest," and which may be constitutionally subjected to State economic regulation, as, *e. g.*,

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[*] Judge Frank reached the same conclusion in considering Part II of the Interstate Commerce Act in *Fordham Bus Corp.* v. *United States*, 41 F. Supp. 712, 715 (S. D. N. Y.).

price-fixing regulation,[21] is not a closed category. Certainly the power of Congress under the commerce clause to subject a business to economic regulation is as least as broad, so far as due process of law is concerned, as that of the States to do so under their police power. *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 582; *Federal Power Commission* v. *Hope Natural Gas Co.*, Nos. 34 and 35, this Term, pamphlet p. 7. Also, while towboats have in the past been regarded as "non-carriers" so far as liability was concerned,[22] it has specifically been held by this Court that this consideration is no constitutional bar to their being subjected to regulation as "common carriers." *Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 207, 211.

II

THE COMMISSION RIGHTLY HELD THAT CORNELL'S TRANSPORTATION WAS IN INTERSTATE COMMERCE

As to at least 4.4 percent of its business, which involves towing of barges from New York points to New Jersey destinations in the New York Harbor area (R. 26, 91, 98), Cornell does not deny

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[21] Rate-making, the heart of Part III, is but one species of price-fixing. *Federal Power Commission* v. *Hope Natural Gas Co.*, Nos. 34 and 35, this Term, pamphlet p. 7.

[22] As pointed out in the *Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 207, this non-carrier liability rule is based merely on the fact that towboats do not have exclusive control of the vessels towed.

that it is engaged in interstate commerce. But it contends that the Commission erred in holding that the remainder of its business, which concededly involves towage by it between two New York State points, was, nevertheless, "interstate commerce" within the meaning of Part III, because Cornell's vessels traversed the territorial waters of New Jersey in transit."

It is said (Cornell Br. 34) that there is no evidence in the record that Cornell's vessels in plying between New York points do in fact pass through New Jersey waters. From the Commission's report, it appears that by compact between New York and New Jersey, approved by Congress on June 28, 1834,[10] the boundary between the two states was fixed as the middle of the Hudson River (R. 51). However, that same agreement gave to the State of New York exclusive jurisdiction over

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[9] The Commission, in view of its holding that all of Cornell's operations between New York points were in interstate commerce, did not have to consider whether such operations were interstate to the more limited extent that they involved situations where the vessels towed or their cargoes were moving in interstate commerce. The record does not show what part of Cornell's traffic is of such nature, although it does indicate that some of it is (R. 100). It is established by a long list of cases beginning with *The Daniel Ball*, 10 Wall. 557, that such commerce in any event is interstate. See also, for example, *B. & O. S. W. R. Co.* v. *Settle*, 260 U. S. 166; *Trojan Powder Co.* v. *Director General*, 88 I. C. C. 447; *Delaware & Hudson Boat Lines*, 40 I. C. C. 297.

[10] The provisions are set forth in 4 Stat. 708–711.

all the waters of the Hudson west of Manhattan Island and south of Spuyten Duyvil creek, subject to certain property rights retained by New Jersey[21] (R. 51–52). The Commission's report further states in this connection (R. 52–53):

> From the north end of Manhattan Island northward to the point where the northern boundary of New Jersey reaches the Hudson River is some 7 or 8 miles. Applicant therefore asserts that only for this distance would its traffic be outside the waters that are under the jurisdiction of the State of New York. It is not necessary for us to pass upon the question of whether the movement of applicant's traffic through the waters of the western half of the Hudson River lying west of Manhattan Island constitutes it interstate commerce, although this applicant in *Cornell Steamboat Co.* v. *Sohmer* [235 U. S. 549], *supra*, contended that it was such, since concededly movement through the waters of the western half of the river north of Manhattan Island is through waters under the jurisdiction of the State of New Jersey. The interstate character of applicant's traffic is determined, not by the number of miles that it moves outside the State

[21] The agreement (4 Stat. 711) further provides:
That nothing therein contained shall be construed to impair or in any manner affect, any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement.

of New York, but by the fact that it *does* move outside the State.

In view of the admissions made by Cornell's counsel,[*] any contention that its vessels in operating

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[*] The following excerpts from Mr. Erskine's letter of January 21, 1944 (printed in full in the Appendix, *infra*, pp. 75–77) are pertinent:

> 1. In the 7-mile stretch of the Hudson River between the northerly end of Manhattan and a point about opposite Hastings, the Cornell tows generally navigate on the easterly, or New York side of the center of the river, where the deep water channel is. They may occasionally navigate in that stretch on the westerly side of the center because of traffic or weather conditions, but it is pure chance if they do.
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> 2. In the area of the Hudson River below the northerly end of Manhattan, southbound tows, in order to make their usual landings at the New York piers, against the ebb tide, maneuver on the westerly side of the center of the river in order to have room in which to round up.
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> 3. Northbound Cornell tows usually start away from the Cornell stakeboat which is moored on the westerly side of the area of the river opposite Manhattan, and in that respect the practice is still the same as referred to in the Sohmer case, 235 U. S. 549.

As appears from the following statement describing its operations in the *Sohmer* decision, 235 U. S. 549, 557, Cornell at that time plainly operated in New Jersey:

> Tows for up-river points on the Hudson River are made up at a stakeboat located at Weehawken, within the territorial limits of the State of New Jersey; that there are two stakeboats anchored in the river just below Weehawken ferry; that vessels and boats reported for the up-river tows are taken out to the

between New York points do not, contrary to the findings of the Commission, in fact pass through New Jersey waters, can have no merit.

The Commission's construction of Part III as embracing such operations within the phrase "interstate commerce" was clearly correct. Under that Part, "transportation in interstate * * * commerce" is defined in Section 302 (i) (1) to mean "transportation of persons or property wholly by water from a place in a State to a place in another State, whether or not such transportation takes place wholly in the United States." It is also provided in Section 303 (k) that "nothing in this part shall authorize the Commission to prescribe or regulate any rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing

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stakeboats and there made fast, and the tow is there made up, the towing vessels are attached, and the course pursued by the steamers in going up the river is in the Territory of New York and New Jersey; that tows coming down the river pursue a like course, going into the territory of both States, and when the tow arrives in New York harbor, the entire tow, or the greater part thereof, is, as a usual thing, turned in the river, going into the territory of New Jersey and making the turn. Deponent further says that nearly all earnings of the company are from business done within the territorial limits of New York and New Jersey, to such extent as the State of New Jersey is included in the Hudson River and New York Bay, and that it is absolutely impossible to state just when the vessels are within the territorial limits of either State. * * *

discrimination against interstate commerce or for any other purpose." As the district court pointed out (R. 131), Cornell's operations fall even within the literal meaning of the statutory definition of transportation in interstate commerce since "it transports from a 'place' in the waters of New York to a 'place' in the waters of New Jersey." See also *Galveston etc. Ry. Co.* v. *Woodbury*, 254 U. S. 357, 359, 360.

The language of Part I dealing with railroads is virtually identical. Section 1 (1) (c) confers jurisdiction over railroad transportation "from one State * * * to any other State." It is further provided in Section 1 (2) (a) that the provisions of Part I do not apply to transportation of property "wholly within one State and not shipped to or from a foreign country from or to any place in the United States." That language was construed, both by the Commission and the courts, many years before the passage of Part III as giving the Commission jurisdiction of rail transportation beginning in one state, running through a second state, and returning to the first state. *Wells-Higman Co.* v. *St. L., I. M. & S. Ry. Co.*, 18 I. C. C. 175, 176; *Willman & Co.* v. *St. L., I. M. & S. Ry. Co.*, 22 I. C. C. 405; *Security Cement & Lime Co.* v. *Baltimore & Ohio Railroad Co.*, 113 I. C. C. 579; *Missouri Pacific R. R. Co.* v. *Stroud*, 267 U. S. 404; *United States* v. *Delaware, L. & W. R. Co.*, 152 Fed. 269, 271–272 (C. C. S.

D. N. Y.). It is true that in the case last mentioned, the court said (152 Fed. 269, 272) that its interpretation was strengthened by the fact that Section 1 (2) (a) in Part I provides that jurisdiction over railroads shall not apply "to the transportation * * * wholly within one State." But Section 303 (k) in Part III similarly precludes jurisdiction as to water carriers over "intrastate transportation." And, as both the Commission and the district court stated (R. 38, 132), if the words "wholly within a State" in Part I fortify the conclusion that the Commission has jurisdiction under Part I over transportation between points in a single state through another state, the similar language contained in Section 303 (k)[22] fortifies a similar conclusion under Part III. This Court, furthermore, has only recently held that where Congress in the Transportation Act of 1940 chose to make identical language applicable to two different types of transportation, it must be considered to have intended that the same construction of the Act be applied to both types. *McLean Trucking Co.* v. *United States*, No. 31, this Term, pamphlet, p. 9. And especially should the jurisdictional provisions of Part III be given a construction consonant with that given the similar railroad provisions in view of the aforementioned general legislative purpose in the

[22] The district court inadvertently referred to this Section as Section 303 (h) (R. 132).

Transportation Act of 1940 to promote equality of regulation between railroads and other forms of transportation. (See pp. 24–26, *supra*.)

Cornell points to certain difference in language in Part II dealing with motor carriers as indicating the incorrectness of the present construction under Part III. Section 203 (a) (10) of Part II, which was first adopted in the original Motor Carrier Act of 1935 (49 Stat. 544) and retained in the Transportation Act of 1940, defines "interstate commerce" to mean "commerce between any place in a State and any place in another State or between places in the same State through another State." Though this language indicates more specifically than the language of Part III, that interstate commerce under Part II included transportation of the present type, still this does not establish that Congress intended a different result under Part III. As the district court held (R. 132–133), Congress must be deemed to have known in 1940 that the courts had held the language employed in Part I had precisely the same meaning as that in Part II. Congress then had a choice of two methods of expressing the same intention. Therefore, no significance can be given to the fact that when it enacted Part II in 1940, it selected the language which it had used in Part I rather than that used in Part II.

The construction of Part III for which Cornell contends must be rejected also because it would

lead to other incongruous results. As the Commission stated (R. 39):

> Taking one illustration: If we were to find that we cannot regulate transportation by water between two points in the same State which passes through another State enroute, we would be in the position of saying that because the origin and destination are in the same State we have no jurisdiction over through all-water shipments from Chattanooga, Tenn., on the Tennessee River, to Memphis, Tenn., on the Mississippi River, although the route extends from Tennessee through Alabama, back through Tennessee, and through Kentucky to the Ohio River, thence on the Ohio along the border between Illinois and Kentucky to Cairo, Ill., thence on the Mississippi bordering Kentucky, Missouri, Arkansas and Tennessee; but at the same time asserting jurisdiction over transportation between intermediate points on the same route where origin and destination are in different States; in other words, that we can regulate the rates for the several interstate *parts* of the transportation, but cannot regulate the rates for the through interstate transportation which is comprised of such parts. The through transportation would thus be left subject to no regulation whatever. *Missouri Pacific R. Co.* v. *Stroud*, 267 U. S. 404.

Cornell places much reliance (Br. 35–36) upon this Court's decision in *Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549, 560. There the Court held that operations by Cornell such as it still conducts today, contrary to its own contentions at that time, were not "interstate *commerce, excluded from the taxing power of the State*, because as to a part of the journey the course is over the territory of another State." [Italics supplied.] Consequently, it was held that a New York tax on the privilege of engaging in the transportation business in corporate form, did not, as applied to Cornell, amount to an unconstitutional burden upon interstate commerce.

But, it is plain from this language that the Court was not there making a general finding that for all purposes Cornell's operations were not interstate commerce, but only that they could not be considered such insofar as the question of the impact of the state tax upon them was concerned. This is further emphasized by an examination of the setting of the case. In the *Sohmer* case, the Court relied (235 U. S. at p. 560) upon *Lehigh Valley Railroad Co.* v. *Pennsylvania*, 145 U. S. 192, and *Ewing* v. *Leavenworth*, 226 U. S. 464. These cases likewise both sustained the validity of state taxes on carriers passing from the taxing state through another state and back into the taxing state. But in the *Ewing* case (226 U. S. at

p. 468), it was clearly recognized that the result in these tax cases was not controlled by cases such as *Hanley* v. *Kansas City Southern Ry. Co.*, 187 U. S. 617, wherein state attempts to regulate, rather than tax, commerce of this same type had been held to be unconstitutional interferences with interstate commerce. See also *Missouri Pacific R. R. Co.* v. *Stroud*, 267 U. S. 404; *Western Union Telegraph Co.* v. *Speight*, 254 U. S. 17. In the *Hanley* case, the Court also made it clear that the tax cases were to be confined to the tax field, distinguishing the *Lehigh Valley* case in the following language (187 U. S. at p. 621):

> That was the case of a tax and was distinguished expressly from an attempt by a State directly to regulate the transportation while outside its borders. * * * And although it was intimated that, for the purposes before the court, to some extent commerce by transportation might have its character fixed by the relation between the two ends of the transit, the intimation was carefully confined to those purposes. * * *

The inapplicability of the *Sohmer* case to the regulatory field is thus plainly apparent. And especially is this true where, as here, the problem is not one of the state's power to interfere with federal control of interstate commerce, but in-

stead the scope to be given to a federal statute regulating such commerce. As this Court has repeatedly held, a state's power to tax and regulate is not the terminal boundary of federal power and merely because something is subject to state taxation it is not necessarily also immune from federal regulation under the Commerce Clause. *Swift & Co.* v. *United States,* 196 U. S. 375, 400; *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 311; *Wickard* v. *Filburn,* 317 U. S. 111, 120–122; see also *Polish National Alliance* v. *National Labor Relations Board,* 136 F. 2d 175, 179 (C. C. A. 7), now on certiorari to this Court, No. 226.

In conclusion, it should be noted that under this Court's decision in *Gray* v. *Powell,* 314 U. S. 402, the Commission's construction of the statute is entitled to great weight. Especially is this true where, as here, "the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new'." *United States* v. *American Trucking Associations,* 310 U. S. 534, 549. The Transportation Act of 1940 is plainly a broad remedial statute to be given a liberal construction against those claiming to be exempt from its provisions. *McDonald* v. *Thompson,* 305 U. S. 263, 266.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decree of the district court should be affirmed.

CHARLES FAHY,
Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

ROBERT L. PIERCE,
Special Assistant to the Attorney General.

WALTER J. CUMMINGS, JR.,
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DANIEL W. KNOWLTON,
Chief Counsel,

EDWARD M. REIDY,
Assistant Chief Counsel,
Interstate Commerce Commission.

FEBRUARY 1944.

APPENDIX

Part I of the Interstate Commerce Act, as amended by the Act of September 18, 1940, 54 Stat. 899, sets forth the National Transportation Policy as follows:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy. (49 U. S. C. 1.)

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Part I of the Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379, as amended.

Section 1 (1) provides:

> That the provisions of this part shall apply to common carriers engaged in—
>
> (a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or
>
> (b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water—
>
> From one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States. (49 U. S. C. 1 (a), (b).)

Section 1 (2) provides in part:

> The provisions of this part shall also apply to such transportation of passengers and property, but only in so far as such transportation takes place within the United States, but shall not apply—
>
> (a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly

within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid; (49 U. S. C. 1 (2).)

Section 1 (3) provides:

(a) The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this part includes an individual, firm, co-

partnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

(b) For the purposes of sections 5, 12 (1), 20, 204 (a) (7), 210, 220, 304 (b), 310, and 313 of this Act, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control. (49 U. S. C. 1 (3).)

Part II of the Interstate Commerce Act, August 9, 1935, c. 498, 49 Stat. 543, as amended.

Section 203 (a) (10) provides:

The term "interstate commerce" means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water. (49 U. S. C. 303 (a) (10).)

Section 203 (a) (14) provides:

The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or

property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I. (49 U. S. C. 303 (a) (14).)

Section 203 (a) (15) provides:

The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation. (49 U. S. C. 303 (a) (15).)

Part III of the Interstate Commerce Act, September 18, 1940, c. 722, 54 Stat. 929.

Sec. 302 provides in part:

(c) The term "water carrier" means a common carrier by water or a contract carrier by water.

(d) The term "common carrier by water" means any person which holds itself out to the general public to engage in the transportation by water in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, except transportation by water by an express company subject to part I in the conduct of its express business, which shall be considered to be and shall be regulated as transportation subject to part I.

(e) The term "contract carrier by water" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation.

The furnishing for compensation (under a charter, lease, or other agreement) of a vessel, to a person other than a carrier subject to this Act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of "contract carrier by water." Whenever the Commission, upon its own motion or upon application of any interested party, determines that the application of the preceding sentence to any person or class of persons is not necessary in order to effectuate the national transportation policy declared in this Act, it shall by order exempt such person or class of persons from the provisions of this part for such period of time as may be specified in such order. The Commission may by order revoke any such exemption whenever it shall find that the application of such sentence to the exempted person or class of persons is necessary in order to effectuate such national transportation policy. No such exemption shall be denied or revoked except after reasonable opportunity for hearing.

(f) The term "vessel" means any watercraft or other artificial contrivance of

whatever description which is used, or is capable of being, or is intended to be, used as a means of transportation by water.

(g) The term "transportation facility" includes any vessel, warehouse, wharf, pier, dock, yard, grounds, or any other instrumentality or equipment of any kind, used in or in connection with transportation by water subject to this part.

(h) The term "transportation" includes the use of any transportation facility (irrespective of ownership or of any contract, express or implied, for such use), and includes any and all services in or in connection with transportation, including the receipt, delivery, elevation, transfer in transit, refrigeration or icing, ventilation, storage, and handling of property transported or the interchange thereof with any other agency of transportation.

(i) The term "interstate or foreign transportation" or "transportation in interstate or foreign commerce", as used in this part, means transportation of persons or property—

(1) wholly by water from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States;

(2) partly by water and partly by railroad or motor vehicle, from a place in a State to a place in any other State; except that with respect to such transportation taking place partly in the United States and partly outside thereof, such terms shall include transportation by railroad or motor vehicle only insofar as it takes place within the United States, and shall include transportation by water only in-

sofar as it takes place from a place in the United States to another place in the United States;

(3) wholly by water, or partly by water and partly by railroad or motor vehicle, from or to a place in the United States to or from a place outside the United States, but only (A) insofar as such transportation by rail or by motor vehicle takes place within the United States, and (B) in the case of a movement to a place outside the United States, only insofar as such transportation by water takes place from any place in the United States to any other place therein prior to transshipment at a place within the United States for movement to a place outside thereof, and, in the case of a movement from a place outside the United States, only insofar as such transportation by water takes place from any place in the United States to any other place therein after transshipment at a place within the United States in a movement from a place outside thereof. (49 U. S. C. 902 (c) (d) (e) (f) (g) (h) (i).)

Section 303 provides in part:

(e) It is hereby declared to be the policy of Congress to exclude from the provisions of this part, in addition to the transportation otherwise excluded under this section, transportation by contract carriers by water which, by reason of the inherent nature of the commodities transported, their requirement of special equipment, or their shipment in bulk, is not actually and substantially competitive with transportation by any common carrier subject to this part or part I or part II. Upon application of a carrier, made in such manner and form

as the Commission may by regulations prescribe, the Commission shall, subject to such reasonable conditions and limitations as the Commission may prescribe, by order exempt from the provisions of this part such of the transportation engaged in by such carrier as it finds necessary to carry out the policy above declared. A carrier (other than a carrier subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended) making such application prior to January 1, 1941, shall be exempt from the provisions of this part until a final determination has been made upon such application if such carrier or a predecessor in interest was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, for interruptions of service over which such carrier or its predecessor in interest had no control.

(f) Notwithstanding any provision of this section or of section 302, the provisions of this part shall not apply—

(1) to transportation by water by a carrier by railroad subject to part I or by a motor carrier subject to part II, incidental to transportation subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services, or in the performance of floatage, car ferry, lighterage, or towage; but such transportation shall be considered to be transportation subject to part I when performed by such

carrier by railroad, and transportation subject to part II when performed by such motor carrier.

(2) to transportation by water by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to part II, or a water carrier subject to this part, in the performance within terminal areas of transfer, collection, or delivery services, or in the performance of floatage, car ferry, lighterage, or towage; but such transportation shall be considered to be performed by such carrier or express company as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water to which such services are incidental. (49 U. S. C. 903 (e) (f).)

Section 309 provides:

(a) Except as otherwise provided in this section and section 311, no common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission: *Provided, however,* That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions

of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such application, the continuance of such operation shall be lawful. If the application for such certificate is not made within one hundred and twenty days after this section takes effect, it shall be decided in accordance with the standards and procedure provided for in subsection (c), and such certificate shall be issued or denied accordingly. Any person, not included within the provisions of the foregoing proviso, who is engaged in transportation as a common carrier by water when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate, and, if application for such certificate is made to the Commission within such period, the continuance of such operation shall be lawful pending determination of such application.

(b) Application for a certificate shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulations, require.

(c) Subject to section 310, upon application as provided in this section the Com-

mission shall issue a certificate to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if the Commission finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied.

(d) Such certificate shall specify the route or routes over which, or the ports to and from which, such carrier is authorized to operate, and, at the time of issuance and from time to time thereafter, there shall be attached to the exercise of the privileges granted by such certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this part or those established by the Commission pursuant thereto: *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require, or the right of the carrier to extend its services over uncompleted portions of waterway projects now or hereafter

authorized by Congress, over the completed portions of which it already operates, as soon as such uncompleted portions are open for navigation.

(e) No certificate issued under this part shall confer any proprietary or exclusive right or rights in the use of public waterways.

(f) Except as otherwise provided in this section and section 311, no person shall engage in the business of a contract carrier by water unless he or it holds an effective permit, issued by the Commission authorizing such operation: *Provided*, That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made, and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in subsection (g) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such application, the continuance of such operation shall be lawful. If the application for such permit is not made within one hundred and twenty days after this section takes effect, it shall be decided in accordance with the

standards and procedure provided for in subsection (g), and such permit shall be issued or denied accordingly. Any person, not included within the provision of the foregoing proviso, who is engaged in transportation as a contract carrier by water when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a permit, and, if application for such permit is made to the Commission within such period, the continuance of such operation shall be lawful pending the determination of such application.

(g) Application for such permit shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulations, require. Subject to section 310, upon application the Commission shall issue such permit if it finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that such operation will be consistent with the public interest and the national transportation policy declared in this Act. The business of the carrier and the scope thereof shall be specified in such permit and there shall be attached thereto at time of issuance and from time to time thereafter such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier by water, as are necessary to carry out the requirements of this part or

those lawfully established by the Commission pursuant thereto: *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his equipment, facilities, or service, within the scope of the permit, as the development of the business and the demands of the carrier's patrons shall require. (49 U. S. C. 909.)

Section 320 (d) provides:

> Nothing in this part shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this part. (49 U. S. C. 920 (d).)

The letter of January 21, 1944, from Mr. Erskine, opposing counsel, reads:

JANUARY 21st, 1944.

Cornell Steamboat Company vs. *United States of America,* No. 384

Your No. 59-30—1682

WENDELL BERGE, *Assistant Attorney General,*
Department of Justice,
Washington, D. C.

DEAR MR. BERGE:

I am still unwilling to sign any such stipulation [that certain portions of Mr. Erskine's oral argument before the full

Commission be made part of the record in this case] as you suggest. It would be far from an accurate portrayal of what transpired during the two oral arguments before the Commission and the argument before the District Court. Perhaps you have failed to notice the concessions which I made on page 35 of my brief in the District Court. The following facts have never been disputed by me, and they could be established by additional testimony.

1. In the 7-mile stretch of the Hudson River between the northerly end of Manhattan and a point about opposite Hastings, the Cornell tows generally navigate on the easterly, or New York side of the center of the river, where the deep water channel is. They may occasionally navigate in that stretch on the westerly side of the center because of traffic or weather conditions, but it is pure chance if they do.

2. In the area of the Hudson River below the northerly end of Manhattan, south-bound tows, in order to make their usual landings at the New York piers, against the ebb tide, maneuver on the westerly side of the center of the river in order to have room in which to round up.

3. North-bound Cornell tows usually start away from the Cornell stakeboat which is moored on the westerly side of the area of the river opposite Manhattan, and in that respect the practice is still the same as referred to in the Sohmer case, 235 U. S. 549.

I am unable to see that those facts in any way affect my criticism of the District Court's finding No. 6. The facts on this point were not dealt with by the Examiner when the testimony was taken before him,

and were not dealt with in the argument before Division 4. The finding made by Division 4, out of a blue sky, led to the full disclosure of these facts during the reargument and in my brief before the District Court.

If you wish to say in your brief before the Supreme Court that the facts which I have stated above are not disputed, you may do so, and you may also print this letter as an appendix to your brief, if you believe that that is in order.

Very truly yours,

(s) ROBERT S. ERSKINE.

RSE.K.
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 384

CORNELL STEAMBOAT COMPANY, APPELLANT,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and NATIONAL WATER CARRIERS ASSOCIATION, INC.,

Appellees.

No. 385

BOSTON TOW BOAT COMPANY, APPELLANT,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and NATIONAL WATER CARRIERS ASSOCIATION, INC.,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF NATIONAL WATER CARRIERS ASSOCIATION, INC.

JAMES A. MARTIN

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In the

Supreme Court of the United States

October Term, 1943

No. 384

Cornell Steamboat Company, Appellant,

v.

The United States of America, Interstate Commerce Commission, and National Water Carriers Association, Inc.,

Appellees.

No. 385

Boston Tow Boat Company, Appellant,

v.

The United States of America, Interstate Commerce Commission, and National Water Carriers Association, Inc.,

Appellees.

BRIEF ON BEHALF OF NATIONAL WATER CARRIERS ASSOCIATION, INC.

Introduction

National Water Carriers Association, Inc., (formerly Atlantic Coastwise and Inland Water Carriers Association, Inc., the corporate name of which was changed to the present name in accordance with the Laws of the State of New York), is a non-profit sharing association

incorporated under the laws of the State of New York, whose members consist of persons, firms and corporations engaged in the transportation of goods for hire by water. Many of its members have business relations with the appellant Cornell, and will be affected by the Court's decision on the questions of law involved; furthermore the construction of various sections of Part III of the Interstate Commerce Act (U. S. C. Title 49 §§ 901-923 inclusive) necessary to a decision of these appeals, is a matter of nationwide interest to all water carriers.

Atlantic Coastwise and Inland Water Carriers Association, Inc., was permitted to and did intervene in the proceedings before Division 4 of the Interstate Commerce Commission (R-24), and in the reargument before the full commission (R-45), pursuant to which an order and certificate as a common carrier by water by towing vessels was issued to the appellant Cornell (R-58); and (its name meanwhile having been changed) likewise was permitted and did intervene (R-66; Footnote R-128) in the trial and argument of said appellant's suit to enjoin, set aside, suspend and annul the said certificate, before a three-judge statutory court in the Southern District of New York, in which action the appellant Boston Tow Boat Company was permitted to and did intervene (R-68) and which resulted in the opinion of said court (R-123), its findings of fact and conclusions of law (R-134), and in a final decree and judgment dismissing the petition (R-136), entered on August 2nd, 1943.

These appeals are before this Court on assignment of error in the opinion, findings, conclusions and judgment of said statutory court (R-139).

This Association before Division 4 of the Interstate Commerce Commission, and on the reargument before the full Interstate Commerce Commission, and before the Court below, took direct issue with every contention of the appellant Cornell Steamboat Company here, namely,

the association contended that in towing non-self propelled barges on the Hudson River, the Cornell Steamboat Company is, within the meaning of Part III of the Interstate Commerce Act, a water carrier; that it was and is "a common carrier by water" within the meaning of Subdivision (d) of Section 302 and not a "contract carrier by water" within the meaning of Subdivision (e) of said Section; and that such towing service on the Hudson River is in Interstate Commerce; and in the following points in this brief it reiterates and adheres to its former position on these issues.

POINT I

Answering the First Point of Appellant Cornell Steamboat Company.

Whether or not a tower has the liabilities of a "carrier" under the common law or general maritime law, is beside the point; appellant was and is a "carrier" in fact, within the limited definition of this statute and as such subject to regulation by Congress, regardless of its "liabilities" as a carrier.

It was not questioned in *Washington ex rel., Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 207, but that the towage there involved constituted "carriage", the contention of the towing companies there being that the private (i.e. contract) "carriage" performed by plaintiff in towing logs on Puget Sound was not subject to regulation as "common carriage"; it is implicit in the opinion of this Court that such towage of logs is "carriage". The opinion states (p. 211):

> "Large quantities of logs are floated from the forests to the mills. Tow boats are commonly used for that purpose. In all essential particulars that service is like the carriage of freight in vessels."

It seems obvious that had this Court been of the opinion that the towage there involved was not "carriage", or transportation of any kind, that would have disposed of the matter without the further inquiry as to whether or not it was "common carriage."

Assuming for the moment that Congress can no more declare an act to be "contract" or private carriage (if the result is to impose undue burdens in new liabilities on such a carrier), than it can declare that to be "common carriage" (with like purpose and result of imposing undue burdens and liabilities), nevertheless Congress (or the States where they have jurisdiction) may reasonably regulate either class of transportation, provided such regulation does not impose undue burdens on the carrier or enlarge his liability beyond that of the common or maritime law.

In the *Kuykendall* case *supra*, this Court stated (p. 211) that "a private carrier cannot be converted into a common carrier by mere legislative command" citing *Frost & F. Trucking Co.* v. *Railroad Commission*, 271 U. S. 583, and *Michigan Public Utilities Commission* v. *Duke*, 266 U. S. 570.

To determine what this Court meant in that case by the brief statement in the opinion to the effect that a private carrier cannot be "converted into a common carrier" by mere legislative "command", it is necessary to examine the basis for that statement in the cases which this Court cited in support of the proposition.

For example, in the first case so cited (*Frost & F. Trucking Co.* v. *Railroad Commission, supra*) plaintiffs in error were engaged under a single private contract in transporting for compensation fruit over the public highways of California between fixed termini. The California statute in question defined the term "transportation company" to mean "a common carrier for compensation over any

public highways between fixed termini or over a regular route." The Statute prohibited the operation by any person or corporation of any automobile, truck, etc., "for the transportation of persons or property as a common carrier for compensation on any public highways in the state * * * unless a permit to operate" as such common carrier has been secured. In other words it prohibited the use of the public highways except by and as "a common carrier". There was no statutory limitation on the definition of "common carrier", making it inevitable for those who enjoyed common law immunity from liability as private carrier, to surrender it and for the sake of securing the right to use the public highways, to consent first, to become burdened with the full liability of a common carrier at common law, and second to regulation as such. As we presently show in an extract from the opinion in that case, it was those two conditions which this court condemned as destructive of the rights of the "private" carriers.

An examination of those cases shows that this Court recognized the distinction between "reasonable regulation" and legislation which is in substance destructive of property rights.

The opinions of this Court in both cases are implicit to the effect that reasonable "regulation" by the State of the use of its highways by a private carrier would be unobjectionable, provided no undue burdens or new "liabilities" are thereby imposed.

In the *Frost* case, this Court said (pp. 591-592):

> "It is very clear that the act, as thus applied, is in no real sense a regulation of the use of the public highway. * * * In other words the case presented is not that of a private carrier who, in order to have the privilege of using the highways, is required merely to secure a certificate of public convenience and become subject to regulations appropriate to that kind of a

> carrier; but it is that of a private carrier who, in order to enjoy the use of the highways, must submit to the condition of becoming a common carrier and of being regulated as such by the railroad commission * * *."

It may be inferred reasonably from this that Congress had the power to require under Part III of the Interstate Commerce Act, those who were or are private carriers (or as they are called in this statute, "contract" carriers) in order to have the privilege of using navigible waters in interstate commerce, to secure merely a "permit" on reasonable terms under the act—which permit cannot be denied to one who was a contract carrier on January 1st, 1940.

There seems to be no doubt that Congress has power to impose reasonable regulations even on "contract" carriers. (*Fordham Bus Corporation* v. *United States,* 41 Fed. Supp. 712, 715 and authorities cited.)

Contrary to the implication sought to be conveyed in said appellant's brief (p. 16) that the definitions of "common" and "contract" carriers in Part III are the same as at common law, it is evident that they are not. In the report of the full Interstate Commerce Commission on January 3rd, 1944 in the case of *Columbia Transportation Company Application,* Docket No. W-773, Vol. —— I. C. C. reports page —— (not yet published) the commission specifically held:

> "* * * there is a specific definition of the term 'common carrier' in part III of the act, which in our judgment modifies the common-law version of a common carrier. * * *"

Appellant also seeks to imply (brief, p. 16) that the definition "carrier by water" in Part III includes what it considers to be an essential part of that definition under

the common or maritime law, namely, the "liabilities" of such a carrier; but such is not the case.

It is as well to understand at the outset that the definitions of "water carrier", "common carrier by water" and "contract carrier by water" in this statute fall far short of including therein what appellant claims to be an essential part of the common law or the maritime law definition of either such carriers. The pertinent definitions which by the express terms of the statute are only "for the purposes of this act" are contained in subdivisions (c), (d) and (e) of Section 302, printed in the Appendix.

Taking the first question raised in the brief of said appellant (Point I) that it is not even a "contract carrier by water" because under the common and maritime law it did not have the "liabilities" of such a carrier, it is evident that the statutory definition in subdivision (e) purposely omits any element of "liability"; i.e., under said subdivision (e) for the purpose of this statute, a "contract carrier by water" means simply "any person which, under individual contracts or agreements, engages in the *transportation* (other than transportation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation".

Passing for the moment the question considered later (Point II) as to whether or not Appellant is a "common carrier by water", if it were not, it was and is at least actually a "contract" carrier because actually and under the common and maritime law engaged in the exact kind of "transportation" defined in said subdivision (e).

Appellant loses sight of the fact that a "carrier" whether contract or common, is such "by virtue of his occupation" and not by virtue of "the responsibilities" under which he rests. (The *Kuykendall* case, *supra*, as quoted under Point II.)

Appellant argues that as it has the common law liability of neither a contract nor a common carrier by water, it may not be classified as either, even for the purpose of reasonable regulation.

But the status for regulation or other purpose, of a contract or a common carrier, does not depend on the liabilities it assumes or which the common law imposes on it, but on what *it does*.

Once it is found that it was and is a "carrier by water", either contract or common (as those terms are defined in this statute) it comes within the purely regulatory provisions of this statute.

It is not forced against its will to assume the liabilities of a contract or a common carrier by water at common law, as a condition to its use of navigable waters in interstate commerce, nor does this statute thrust such liabilities upon it.

The opinion of this Court in the *Kuykendall* case pointed out that the rule that towboats not having exclusive control of the vessels towed "are not to be held to the strict liability of common carrier" did not affect the question there under consideration (i.e. one of reasonable regulation).

So as to a "contract" carrier, it may be said that the question of the "liability" of towboats or owners, under the common or maritime law "does not affect the question" under consideration in this point—which is one of reasonable regulation of any person who, under individual contracts or agreements, engages in the "transportation" by water of passengers or property in interstate or foreign commerce for compensation (without regard to the liabilities of the person so engaged).

Appellant attempts to distinguish the *Kuykendall* case pointing out that the towing companies there involved carried the logs, "by attaching their tugs' lines to the floating rafts or clusters."

But there is sound authority for the proposition that even towing "vessels", with or without cargo is "transportation."

In *Matter of Newtown Creek Towing Co.* v. *Law*, 205 A. D. 209, affirmed 237 N. Y. 578, it was held that plaintiff engaged in the business of towing vessels in the Hudson River was engaged in "transportation" within the meaning of Section 184 of the New York Tax Law as amended by Chapter 334, Laws of 1914, which imposed an excise tax on certain corporations and on "every other transportation corporation" (with certain exceptions not here relevant). In the opinion of the Appellate Division it is stated (p. 211):

> "This question is not to be solved by deciding whether or not the steam towboat is a common carrier (*Wells* v. *Steam Navigation Co.*, 2 N. Y. 204; *Alexander* v. *Greene*, 3 Hill, 9 or whether such towboat is required, in the handling of a tow, to exercise ordinary and reasonable care or the greatest care of which human foresight is capable (*Caton* v. *Rumsey*, 13 Wend. 389), but by deciding whether towing is transporting or an agency or means by which transportation is affected. (*Gloucester Ferry Company* v. *Pennsylvania*, 114 U. S. 213). For if towing be transporting then the petitioner comes within the description of the statute, "every other transportation corporation," and should claim no favor or immunity not enjoyed by corporations organized under the Transportation Corporations Law.
>
> "The derivation of the English word 'transport' is in the Latin tongue 'trans', signifying over, and 'portare', signifying to carry. Transport has been defined in the law by the English word 'remove'. (38 Cyc. 946; *Columbia Conduit Co.* v. *Commonwealth*, 90 Penn. St. 309.)
>
> "It seems to me that since the result of transportation in the instant case is not accomplished except by the use of a steam tugboat such tugboat is engaged in transportation, doing business in part at least of transporting. * * *"

> "Upon the record the case of *People ex rel., Cornell Steamboat Co.* v. *Sohmer* (206 N. Y. 651) is on all fours with the case at bar. It constitutes authority for holding a corporation organized under the Business Corporation Law and its antecedent statutes to be a transportation corporation within the language of Section 184 of the Tax Law."

The case of *People ex rel., Cornell Steamboat Company* v. *Sohmers* cited in the above quotation, was affirmed in this Court (235 U. S. 549). The relator in that case (the appellant Cornell here) does not seem to have questioned that the towing business in which it was engaged on the Hudson River was "transportation" within the meaning of said Section 184 of the New York Tax Law. The opinion of this Court in that case described the towing activities of the *Cornell Steamboat Company* on the Hudson River substantially as in the record of this case. In its opinion this Court said (235 U. S. 558):

> "It is apparent from a consideration of Section 184 that the tax here imposed upon transmission and transportation corporations is for the privilege of carrying on the business in a corporate capacity within the State of New York, for which an annual excise tax or license fee is exacted equal to 5/10 of 1 per centum upon the gross earnings on transportation originating and terminating in the State of New York."

It seems plain from the *Newtown Creek Towing Co.* and the said *Cornell Steamboat Company* cases that if in fact those respective companies had not at the times in question been engaged in "transportation", they could not be made so even for taxation purposes, by a mere statutory declaration that they were.

It will be noted that neither in the *Newtown Creek Towing Co.* case nor in the *People ex rel. Cornell Steamboat Company* case did the question as to whether or not the towboat companies there involved were engaged in

"transportation" depend at all on their "liabilities" in conducting such transportation.

There was added to the Internal Revenue Code (U. S. C. Title 26) in 1942 a new section, viz, number 3475, which as far as now relevant, imposed a tax upon the amount paid within the United States after the effective date of the section, for the "transportation" of property by rail, motor vehicle, water or air from one point in the United States to another. Former income tax laws had imposed a somewhat similar "transportation" tax; but neither under the present statute nor under the earlier ones is the question as to whether or not the activity was one of "transportation" made to depend upon the "liability" of the carrier.

Appellant and Boston Towboat Company, intervenor, make much of the point that as "towage" or "Towing" is not expressly included in any of the definitions of "transportation" or of a transportation "facility" under Part III, and that it cannot be brought in as "transportation" by the express exception of certain kinds of "towage" under Section 303 (f) (2). It may be conceded that if towage does not come within the broad definition of "transportation by water" or if the definition of transportation "facility" therein (both definitions being read in the light of the legislative history of the statute) were not broad enough to include towage and a towing tug, that an exception excluding certain kinds of towage could not have the effect of including towage.

But it seems quite clear that the definitions of "transportation" and of transportation "facility" are broad enough to include towage in general, thus instead of rendering the exception meaningless, as had been argued, making it apt and confirming the meaning of the prior broad definitions of "transportation" and transportation "facility". (*St. John* v. *American Mutual Fire & Marine Insurance Company*, 11 N. Y. 516, 519).

As is very clearly shown in the present brief of the United States and the Interstate Commerce Commission (pp. 24-26; 30-31) the legislative history of this statute shows that the precise form of towage which appellant now contends was not intended to be regulated, was one of the principal activities deemed in need of regulation.

It is submitted that appellant's have no present valid objection to this statute. Not only does it not enlarge the tower's liability beyond what it was under the common or maritime law, but it contains express provisions by which we submit, the tower's liability may be limited, in the filed schedules or tariffs, in accordance with the common or maritime law.

While under Section 20, paragraph 11 of Part I of the Act, and by Section 219 of Part II, the rights of common carriers by railroad and by motor truck, respectively, to limit their liability is substantially restricted, there is no corresponding restriction in Part III of the right of a common carrier by water subject to that Part to limit its liability.

It is submitted that under Section 306 (see Appendix) Subdivision (e) any "contract carrier by water" may by appropriate rules or regulations in its filed schedules, and under subdivision (a) any "common carrier by water" by like rules or regulations in its filed tariffs, may suitably limit its liability in accordance with the common or maritime law.

It will be noted that the statute contains no limitation as to the subject matter which such rules and regulations filed by a common or contract carrier, shall contain.

Not until the Interstate Commerce Commission disapproves of any such rule or regulation of appellant or any other tower, will they have any ground to complain that their "liabilities" are enlarged by this statute.

POINT II

Answering the Second Point of said appellant.

The implication of the second point of the brief of said appellant is that Congress, by this statute, has converted independent towers into common carriers with all the liability of common carriers under the common or maritime law.

No such attempt is made under this statute.

The question, in truth, is whether or not towing companies which have held and now hold themselves out to the public at large to perform towage service for hire, regardless as to whether or not they assume the "liabilities" incident to that of a common carrier under the common or maritime law, may be subject to reasonable regulation, which imposes no undue burden and adds no new liabilities.

For a common carrier to be subject to reasonable regulation it is not necessary that its activities be such as to make it subject to the "liabilities" of a common carrier under the common or maritime law. A carrier may be a "common carrier" for the purpose of reasonable regulation even though the elements (in addition to its holding out to the public to perform the services for hire) of exclusive possession and control of the thing transported are not in the carrier; further its status as a common carrier is not determined by the "responsibilities" (*i. e.* liabilities) under which it rests, but by what it does. As was said by this court in *Washington, ex rel. Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 211:

> "• • • The statute does not attempt to make all towboats common carriers. Its application is limited to those operated in the public use for hire. The rule that towboats not having exclusive control of vessels towed are not to be held to the strict liability of common carriers (citing cases in a foot note) does

not affect the question under consideration. And the notice in the tariff that all tows are at owner's risk is immaterial. 'A common carrier is such by virtue of his occupation not by virtue of the responsibilities under which he rests'. (Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana), 129 U. S. 397, 440)".

In the case of *Liverpool and Great Western Steam Co.* v. *Phenix Ins. Co.* cited in the above quotation, it is evident that this court in order to ascertain whether or not "The Montana" was a common carrier did not first inquire as to the "liabilities" which she assumed at law or under the bills of lading, but what she and her owners in fact did.

It was only after having found that the vessel was a common carrier having exclusive possession and control of the goods carried, that this court proceeded to determine the nature and extent of her liability.

There the test was: Did the Montana hold herself out to the public in general to carry goods for hire? It was only when that question was disposed of that the subject of the vessel's liability arose.

Here the test is: Did the towboat company hold itself out to the public in general to perform transportation (i. e., towage—see Point I) for hire? If so, it is subject to reasonable regulation; the question of tower's liability as a carrier, common or otherwise, is not involved.

We think that on the subject of the holding out by appellant to "the general public" to perform transportation services (i. e., towage) for hire, with the result that it was and is a "common" carrier, within the meaning of this statute, nothing need be added to what is said in the opinion below (Record, p. 131).

It may be conceded that had this statute attempted under the guise of regulation to impose the burdens or lia-

bilities "of common carriers by water" on such a company, without defining the term, it would be ineffective, unless, in fact, the company was a common carrier within the meaning of the common or maritime law (*Frost & F. Co.* v. *Railroad Commissioner*, 271 U. S. 583).

It is submitted that this statute makes no such attempt; under Part III the carrier is not made a "common carrier by water" for all purposes, nor is it required to become one; no new "liability" is imposed upon it; as the court below said (fol. 231, R. p. 130):

> "* * * By labeling persons such as plaintiff 'common carriers' in this Act, they do not become such for all purposes; this is made clear by Section 302 which, in so labeling them, expressly states that it does so 'for the purpose of this act.' And see *Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 199, 211-212; *United States* v. *Brooklyn Terminal*, 249 U. S. 296, 304; *Liverpool Steam Company* v. *Phenix Insurance Co.*, 129 U. S. 397, 440."

POINT III

Answering the Third and Fourth Points of the said Appellant.

We think that said appellant's Third Point has been sufficiently answered under Points I and II of this brief; we wish merely to add in connection with the said Third Point that it seems evident that a "Wharfinger" which operates nothing on water and has no connection with such operation, is not a "carrier by water". Its position is scarcely analogous to plaintiff's operation of powerful self-propelled tugs.

We submit that said appellant's Point Four has been sufficiently answered in the preceding Points of this brief, and in the opinion below (Record, p. 130, fol. 232).

POINT IV

Answering the said Appellant's Fifth Point.

That the said appellant's towage between places in New York State is interstate, we submit is already clearly established by the reasoning of the opinion below (Record, pp. 131-133), and in the present brief of the United States and the Interstate Commerce Commission (Point II); to add to either seems unnecessary.

POINT V

Answering the said Appellant's Sixth Point.

This has already been answered in Point II of this brief, and more at length in Point I, subdivision B of the brief of the United States and the Interstate Commerce Commission—all to the effect that the said appellant was properly classified as a "common carrier by water" rather than a "contract" carrier.

POINT VI

Answering the brief of the Boston Tow Boat Company.

As the appellant Boston Tow Boat Company in its brief takes substantially the same position on the matters which concern it, as is taken by the appellant Cornell Steamboat Company, it would seem to serve no useful purpose in repeating in answer thereto what has been said herein in answer to the brief of the Appellant Cornell.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the decree of the District Court should in all respects be affirmed.

Respectfully submitted,

JAMES A. MARTIN

Dated: February 1944.

Appendix

Definitions.

Section 302 (Added September 18, 1940) (U. S. Code, Title 49, chapter 12, Sec. 902) For the purposes of this chapter—

(a) * * * * *

(b) * * * * *

(c) The term "water carrier" means a common carrier by water or a contract carrier by water.

(d) The term "common carrier by water" means any person which holds itself out to the general public to engage in the transportation by water in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, except transportation by water by an express company subject to chapter I of this title in the conduct of its express business, which shall be considered to be and shall be regulated as transportation subject to chapter I of this title.

(e) The term "contract carrier by water" means any person which, under individual contracts or agreements engages in the transportation (other than transportation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation.

Tariffs and Schedules.

Section 306 (Added September 18, 1940). (U. S. Code, Title 49, Section 906.) (a) Every common carrier by water shall file with the Commission and print, and keep open to public inspection tariffs showing all rates, fares, charges, classifications, rules, regulations, and practices for the transportation in interstate or foreign commerce of passengers and property between places on its own route, and between such places and places on the route of any other such carrier or on the route of any common carrier by railroad or by motor vehicle, when a through

route and joint rate shall have been established. Such tariffs shall plainly state the places between which property or passengers will be carried, the classification of property or passengers and, separately, all terminal charges, or other charges which the Commission shall require to be so stated, all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such rates, fares, or charges, or the value of the service rendered to the passenger, shipper, or consignee.

* * * * * * * * *

(e) It shall be the duty of every contract carrier by water to establish and observe reasonable minimum rates and charges for any service rendered or to be rendered in the transportation of passengers or property or in connection therewith and to establish and observe reasonable regulations, and practices to be applied in connection with said reasonable minimum rates and charges. It shall be the duty of every contract carrier by water to file with the Commission, post, and keep open for public inspection, in accordance with such rules and regulations as the Commission shall prescribe, schedules of minimum rates or charges actually maintained and charged for interstate and foreign transportation to which it is a party, and any rule, regulation, or practice affecting such charges and the value of the service thereunder. No contract carrier by water, unless otherwise provided by this chapter, shall engage in transportation subject to this chapter unless the minimum rates or charges actually maintained and charged have been published, filed, and posted in accordance with the provisions of this chapter. No new rate or charge shall be established and no reduction shall be made in any rate or charge, either directly or by means of any change in any rule, regulation, or practice affecting such rate or charge, or the value of service thereunder, except after thirty days' notice of the proposed new rate or charge, or of the proposed change, filed in accordance with this section. The commission may, in its discretion and for good cause shown, allow the establishment of any such new rate or charge, or

any such change, upon notice less than herein specified, or modify the requirement of this section with respect to posting and filing of such schedules, either in particular instances or by general order applicable to special or peculiar circumstances or conditions. Such notice shall plainly state the new rate or charge, or the change proposed to be made, and the time when it will take effect. It shall be unlawful for any such carrier to transport passengers or property or to furnish facilities or services in connection therewith for a less compensation, either directly or by means of a change in the terms and conditions of any contract, charter, agreement, or undertaking than the rates or charges so filed with the Commission: PROVIDED, That the Commission, in its discretion and for good cause shown, either upon application of any such carrier or carriers, or any class or group thereof, or upon its own initiative may, after hearing, grant relief from the provisions of this subsection to such extent, and for such time, and in such manner as, in its judgment, is consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act.

[29178]

P. 1.

SUPREME COURT OF THE UNITED STATES.

No. 384.—October Term, 1943.

Cornell Steamboat Company, Appellant, *vs.* The United States of America, Interstate Commerce Commission, et al.	On Appeal from the District Court of the United States for the Southern District of New York.

[April 3, 1944.]

Mr. Justice Black delivered the opinion of the Court.

Cornell operates tugboats for hire on the Hudson River and in and about New York harbor. Its tugs carry no cargo but move scows, barges, and similar vessels belonging to others which themselves usually carry cargo. This towing service Cornell offers to perform for the public in general. About ninety-five per cent of the vessels which it serves are moved from points in New York to other points in the same State, but these movements generally traverse New Jersey as well as New York waters. Part III of the Interstate Commerce Act[1] provides that contract or common carriers by water in interstate commerce are subject to the Act's regulating provisions. In appropriate proceedings the Interstate Commerce Commission held Cornell's business covered. 250 I. C. C. 301; 250 I. C. C. 577. A three judge District Court sustained the Commission's order. — F. Supp. —. The case is here on direct appeal. 28 U. S. C. §§ 47a, 345.

First. Cornell argues that its towboats are not "water carriers" within the meaning of Part III of the Act. Looking at Part III, we find that, read together, §§ 302(c), (d) and (e) define a "water carrier" as any person who engages in the "transportation by water . . . of . . . property . . . for compensation." Section 302(h) defines "transportation" as including "all services in or in connection with transportation", as well as "the use of any transportation facility." Any "vessel", which means any "watercraft", § 302(f), is such a facility. § 302(g). Congress has thus carefully and explicitly set out the conditions which in combination

[1]Transportation Act of 1940, c. 722, 54 Stat. 898, 929.

describe the kinds of carriers it intended to subject to regulation. Cornell's tugboats fall squarely within the description. If further proof of this be needed, §§ 303(f)(1) and (2) expressly exempt from regulation under Part III certain types of towage service, but not that such as Cornell provides. Congress hardly would have exempted some towers, as it did in these sections, had it intended to exempt all towers.

Nevertheless, Cornell argues that the Act's language, which appears on its face plainly to include transportation by means of towers, should not be so construed. In support of this contention, it is said that towers do not have that common law or statutory liability to shippers which generally attaches to common carriers, see *Sun Oil Co.* v. *Dalzell Towing Co., Inc.*, 287 U. S. 291; cf. *The Murrell*, 200 Fed. 826; and that a "carrier" has been judicially defined as one who undertakes to transport the goods of another, a definition not inclusive of Cornell, since it does not make contracts to carry goods but only to move vessels which have goods on them. See *Sacramento Navigation Co.* v. *Salz*, 273 U. S. 326, 328; *The Propeller Niagara, etc.* v. *Cordes*, 62 U. S. 7, 22. But the authorities relied upon by Cornell are of little or no assistance here. The case at bar does not require that we determine at large the legal obligations of a tower or define the usual characteristics of a carrier. We are called upon only to interpret a single Act of Congress. With unquestioned power to regulate Cornell's business, Congress in this Act has given its own definition to Cornell's activities in words literally inclusive of those activities, and which operate to subject to the Act interstate activities in the business of towing, which at common law was a common calling. *Sproul* v. *Hemmingway*, 14 Pick. 1, 6. The Act in which Congress has included this definition is designed, not to determine the legal status of vessels for all purposes,[2] but to provide for regulation of the rates and services of competing interstate water carriers as part of a broad plan of regulation for all types of competing interstate transportation facilities. Cornell is in active competition with other types of interstate water carriers as well as with trucks and

[2] Compare § 320(d) of Part III of the Act: "Nothing in this part shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this part." 49 U. S. C. § 920(d); 54 Stat. 950.

railroads. Therefore, if Cornell's particular method of providing water transportation facilities for others is not subject to regulation under the Act, it would appear to present an anomalous exception to the Congressional plan for regulation of competing transportation activities. We conclude that the language of the Act brings Cornell's business within its coverage, and that to construe the Act otherwise would frustrate the purpose of Congress.

Second. Cornell argues that even if it is covered by Part III of the Act, there was error in holding it to be a "common" rather than a "contract" carrier. Section 302(d) defines a "common carrier" as one "which holds itself out to the general public to engage in the transportation by water . . . of . . . property . . . for compensation." The Commission found from evidence offered that Cornell did so hold itself out to the general public. Upon review the District Court held the Commission's finding was supported by substantial evidence. The opinions of the Commission and the District Court showed the evidence relied on and it is unnecessary to repeat it here. Sufficient it is to say that we agree with the District Court's conclusion.

Third. The five per cent of Cornell's business which consists of moving vessels between New York and New Jersey ports is unquestionably covered by the Act, because § 302(i)(1) specifically includes transportation "wholly by water from a place in a State to a place in any other State."[3] But about ninety-five per cent of the vessels towed by Cornell are picked up at New York ports and pulled to other ports in the same State. Cornell contends that none of these movements come within the Commission's jurisdiction. We accept findings of the Commission and the District Court that at least a substantial proportion of these latter movements regularly and ordinarily pass over New Jersey territorial waters. While moving on New Jersey waters, Cornell's vessels are not at that time at "a place" in New York. Certain of its towing ac-

[3] This section should be read together with §§ 303(j) and (k) of Part III which are as follows:

"(j) Nothing in this part shall be construed to interfere with the exclusive exercise by each State of the power to regulate intrastate commerce by water carriers within the jurisdiction of such State.

"(k) Nothing in this part shall authorize the Commission to prescribe or regulate any rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose."

The words "intrastate commerce" and "intrastate transportation" as used in these two subsections are not expressly defined in Part III.

tivities therefore actually move vessels from places in New York to places in New Jersey and thence back to places in New York. Such movements, if made on land by rail carriers, would be classified as interstate for regulatory purposes under previous decisions of this Court;[4] and, as the Commission's opinion points out, these decisions have cast grave doubts upon the power of a single state to regulate such movements in whole or in part. Water transportation between two ports of a single state may touch many other states, and pass through hundreds of miles of other states' waters, far removed from the state in which the terminal ports of the voyage are located. Power of the Commission to regulate such movements appears to come well within the broad purposes declared by Congress in passing legislation designed comprehensively to coordinate a national system of all types of transportation. We are unpersuaded that Congress has inadvertently left such a gap in its plan as acceptance of Cornell's argument would create.

The pertinent language Congress used in defining what should be interstate commerce in Part III of the Act regulating water carriers is to all practical intents and purposes the same as it used in Part I regulating rail carriers.[5] Part III of the Act, including this definition, first was drafted in the House Committee on Interstate Commerce as part of a general revision of an omnibus transportation bill [S. 2009] proposed by the Senate Committee on Interstate Commerce. See H. R. No. 1217, 76th Cong., 1st Sess. In reporting on the provisions of Part III, the House Committee, a body well acquainted with transportation legislation, made the statement that, "Most of the regulatory provisions included in the new part III were modeled on provisions of part I dealing with the same subject." *Id.*, p. 18. At the time of this report,

[4] Hanley *v.* Kansas City Southern Ry. Co., 187 U. S. 617. The rule of the *Hanley* case has not been changed by the cases holding that companies engaged in such transportation movements are subject to taxation by the state where the terminal points are located. See Cornell Steamboat Company *v.* Sohmer, 235 U. S. 549; Lehigh Valley Railroad Co. *v.* Pennsylvania, 145 U. S. 192; Ewing *v.* Leavenworth, 226 U. S. 464, 468-469.

Compare Wilmington Transp. Co. *v.* Cal. R. R. Comm., 236 U. S. 151, 155-156, which held that transportation on the high seas between two points within the state of California, Santa Catalina Island and San Pedro, being "local" and not involving "passage through the territory of another state", was subject to rate regulation by California in the absence of controlling federal legislation.

For a general survey of state and federal legislation pertaining to regulation of water carriers, see Regulation of Transportation Agencies, Senate Document No. 152, 78rd Cong., 2nd Sess., pp. 5-13, 98-170.

[5] See Note 7, *infra*.

the definition of interstate commerce in Part I upon which that in Part III was modeled had long before been interpreted both by the Commission and the courts as broad enough to cover railroad movements which pass through the territory of two states, even though the freight be carried from a place in one state to another place in the same state. *Missouri Pacific R. R. Co.* v. *Stroud*, 267 U. S. 404.[6]

Parts I, II, and IV of the Interstate Commerce Act, relating respectively to regulation of rail carriers, motor carriers, and freight forwarders, explicitly or by judicial interpretation cover all shipments which pass through the territory of two or more states even though both terminal points are in the same state.[7] And so if railroads or truckers should use tugs for the same purposes and over the same route as Cornell the movements would be interstate under the Act and subject to regulation by the Commission; and apparently the same is true of freight forwarders. From the language of Part III of the Act, its history, and its general purpose, we conclude that the Commission and District Court correctly decided Cornell's transportation through New York and New Jersey waters also is subject to regulation by the Commission.[8]

Affirmed.

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[6] See also Wells-Higman Co. v. St. L., I. M. & S. Ry. Co., 18 I. C. C. 175, 176; Willman & Co. v. St. L., I. M. & S. Ry. Co., 22 I. C. C. 405; Security Cement & Lime Co. v. Baltimore & Ohio Railroad Co., 113 I. C. C. 579; United States v. Delaware, L. & W. R. Co., 152 Fed. 269, 271-272 (C. C. S. D. N. Y.).

[7] Part I, § 1(1) of the Act confers jurisdiction over "transportation . . . wholly by railroad . . . from one State . . . to any other State." 49 U. S. C. § 1(1); 24 Stat. 379 as amended. As previously stated this has been construed to include transportation starting in one state, passing through a second state, and returning to the first state. See Note 6, *supra*.

Part II, § 203(a)(10) of the Act defines the "interstate commerce" by motor vehicle over which the Commission has jurisdiction as including "commerce . . . between places in the same State through another State. . . ." 49 U. S. C. § 303(10); 49 Stat. 543, 544, as amended.

And Part IV, § 402(a)(6) defines that transportation which shall be deemed "interstate commerce" for the purpose of regulation of freight forwarders as including "transportation . . . between points within the same State but through any place outside thereof." 49 U. S. C. § 1002(a)(6); 56 Stat. 284, 285.

[8] As reported in the Senate, the original omnibus transportation bill [S. 2009] contained a single definition of "interstate commerce" applicable alike to rail, motor, and water carriers. This definition embodied the holding of the *Stroud* case (267 U. S. 404) cited in our opinion by expressly including "transportation . . . between places in the same State by a route . . . passing beyond the borders of said State." § 3(25), Bill S. 2009, reported

to the Senate May 16, 1939. It has been suggested that the failure of the House Committee's revision of Bill S. 2009 to retain this part of the definition contained in the original bill indicates an intention that the rule of the *Stroud* case should not apply to water transportation. In reaching our conclusion in the present case, we have considered this suggestion and have rejected it for several reasons.

In the first place, the House Committee's failure to retain in Part III the particular language of the definition of "interstate commerce" in original S. 2009 is sufficiently explained by the fact, noted in the body of our opinion, that the Committee modeled Part III, not upon the provisions of original S. 2009, but upon the existing Part I of the Act. And from the report of the House Committee, a body experienced in matters of transportation legislation, we may fairly infer that, in thus using the language of Part I, it had in mind the same objective as the Senate Committee which drafted the original S. 2009, namely to save "so far as possible the existing language so that full advantage may be taken of the many interpretations, both judicial and administrative, which have been put upon the respective sections." See S. R. No. 433, 76th Cong., 1st Sess., p. 4; and H. R. No. 1217, 76th Cong., 1st Sess., pp. 18-19. Cf. McLean Trucking Company, Inc. *v.* United States, No. 31, this term, pp. 8-9.

Furthermore, had the experienced House Committee intended to place in Part III a definition of "interstate commerce" different in scope from that in Part I, it hardly would have expressed such an intention by adopting substantially the identical language of Part I. But neither the House nor the Senate Committee appears to have had any such intention. As shown by their reports and the language of the bills which they drafted, the intention of both Committees, and of Congress, was to provide for regulation of the same sort of interstate water shipments as already were being regulated in the case of interstate rail shipments. See H. R. No. 1217, *supra;* S. R. No. 433, *supra.*

Mr. Justice FRANKFURTER, dissenting in part.

When in 1940 Congress provided for the regulation of water carriers in interstate and foreign commerce, it defined "transportation in interstate . . . commerce" for the purpose of such regulation to mean "transportation of persons or property—(1) wholly by water from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States". § 302(i)(1) of the Transportation Act of 1940, 54 Stat. 898, 929, 49 U. S. C. § 902(i)(1). To the extent that the decision of the Court construes the field of regulation thus defined by Congress to include tugboats moving on the Hudson River from place to place in New York simply because they leave the New York boundary of the river and navigate on what are deemed Jersey waters, I dissent.

The problem is here, as it was before the Commission, for the first time. And the Court's duty of construction is not aided by the light of continuous administrative practice, though of course even the initial conclusion by the Commission on such a question of law should have its weight. But since the matter ultimately

turns on general considerations regarding the manner in which legislation should be construed, I deem it appropriate to add a few words to the views expressed by Commissioner Splawn that Part III of the Interstate Commerce Act does not bring within the regulatory powers of the Interstate Commerce Commission transportation on a boundary stream between points in the same State merely because a water carrier crosses a state boundary in a stream.

The terms by which Congress conferred jurisdiction upon the Commission successively over rail carriers, motor carriers and water carriers are different. In a field so well trodden as this, involving as it does the distribution of authority as between States and Nation over transportation facilities of interest to both governments, one would suppose that only the environment of legislation and the history of its enactment could dislodge the natural assumption that different literary roads taken by Congress had different objectives. For we are here concerned with three different definitions having different genealogies in the general field of regulation incorporated in one piece of legislation, namely the Transportation Act of 1940. There is nothing in the legislative history of the extent of the power over transportation by water carriage committed to the Commission to show that Congress meant that the phrasing which it employed was in purpose to be identic with the different phrasings Congress used as to rail and motor carriers. The legislative history indicates the contrary.

The Cullom Act of 1887, as is well known, was in direct response to *Wabash, &c., Railway Co.* v. *Illinois*, 118 U. S. 557. That decision rested fundamentally on the view that rail transportation has a physical unity and to such an extent that, as held very early, regulation of rail rates cannot be "split up" between two States or left only to one State even as to transportation which begins and ends in the same State but passes through the territory of another. See *Hanley* v. *Kansas City Southern Ry. Co.*, 187 U. S. 617. The terms in which Congress granted regulatory power over railroads to the Interstate Commerce Commission reflected this view. The Commission was authorized to regulate rail transportation "from one State . . . to any other State", but the provisions of the Act were not to apply "to the transportation . . . wholly within one State . . . ." § 1 of the Act to Regulate Commerce, 24 Stat. 379, 49 U. S. C. §§ 1(1), (2)(a). When

Congress in 1935 brought motor carriers within the regulatory powers of the Commission, it was not content to define the scope of the transportation to be regulated in terms of the scope of the regulated railroad transportation. It defined the motor transportation to be regulated to include "commerce between any place in a State and any place in another State or between places in the same State through another State". § 203(a)(10) of the Motor Carrier Act of 1935, 49 Stat. 543, 544, 49 U. S. C. § 303(a)(10). It used this explicit and precise language because the conditions of motor transportation in relation to state control differ from the conditions of interstate railroad transportation, and it wished to leave no doubt whatever that it was regulating rates on motor transportation within the same State through another. The same explicitness was again used by Congress when in 1942 it swept freight forwarders who serve interstate transportation within federal control. §402(a)(6), 56 Stat. 284, 285, 49 U. S. C. (Supp. 1942) §1002(a)(6).

A totally different situation was presented to Congress by the heavy water traffic on boundary streams throughout the country. In his report as Federal Coordinator of Transportation, the late Commissioner Eastman pointed out that thirty-two States had laws regulating water transportation "on inland waters and in some instances on bordering streams or lakes and coastal waters." Sen. Doc. No. 152, 73d Cong., 2d Sess., p. 158. This Court, in *Port Richmond Ferry* v. *Hudson County*, 234 U. S. 317, had occasion to call attention to this lively water traffic which, throughout our history, presented "a situation essentially local requiring regulation according to local conditions." 234 U. S. at 332. For that reason it sustained State regulation of ferry rates even for transportation from one State to another.[1] The doctrine of *Hanley* v. *Kansas City Southern Ry. Co., supra*, is thus a doctrine applicable to railroads and has not been applied to water carriers.

[1] "It has never been supposed that because of the absence of Federal action the public interest was unprotected from extortion and that in order to secure reasonable charges in a myriad of such different local instances, exhibiting an endless variety of circumstance, it would be necessary for Congress to act directly or to establish for that purpose a Federal agency. . . . The practical advantages of having the matter dealt with by the States are obvious and are illustrated by the practice of one hundred and twenty-five years. And in view of the character of the subject, we find no sound objection to its continuance. If Congress at any time undertakes to regulate such rates, its action will of course control." 234 U. S. at 332.

See *Wilmington Transp. Co.* v. *Cal. R. R. Comm.*, 236 U. S. 151, 155-156.

In 1940 Congress did undertake to regulate water transportation. But in view of the different ways in which rail, motor and water transportation are entangled with state interests and therefore state authority, it becomes vital to heed the exact language in which Congress expressed its purpose of regulation and the manner in which it finally passed the provisions by which it defined the Commission's authority.

In a word, the bill as enacted was in quite a different form from the bill as originally introduced. As the bill came out of the Senate Committee on Interstate Commerce and as passed by the Senate it had this provision: "the term 'interstate commerce' means transportation . . . from a place in one State . . . to a place in another State . . . or between places in the same State by a route or routes passing beyond the borders of said State . . . ." 84 Cong. Rec. 5964. This was not merely a choice of language but a choice of purpose. The Committee and the Senate, that is, asserted a control as extensive as that which Congress asserted in 1935 over motor carriers. The practical result of the purpose thus manifested was to exclude state control over water carriers from port to port in the same State but entering the water of a border State. The House evidently had other views, for that provision was deleted after the Senate bill was committed to the House Committee. That Committee reported and the House passed this restrictive provision: "The term 'interstate or foreign transportation' . . . means transportation of persons or property—(1) wholly by water from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States". 84 Cong. Rec. 9956. The Senate receded from its formulation (H. Rep. No. 2016, 76th Cong., 3d Sess., p. 30), and the restrictive House provision became the law. But we are now told that this change from explicit assumption of jurisdiction is meaningless, and the fact that the provision in the Senate bill was left out as the bill went through the House, the Conference and to passage has precisely the same significance as though the original Senate provision had remained in it. As to this as well as other phases of water transportation, Congress circumscribed the Commission's authority and left state regulation to continue to operate as to matters which, in the case

of rail and motor transportation, federal control has been asserted. Thus for instance, use of the Shreveport doctrine (see *Houston & Texas Ry.* v. *United States*, 234 U. S. 342)—the control over state rates discriminatory against interstate rates—is explicitly denied (§ 303(k)), and numerous other exceptions and exemptions show "congressional intent to confer more limited jurisdiction than has been given in the other parts of the act." 250 I. C. C. 577, 586.

No doubt, as the House Committee said, "Most of the regulatory provisions included in the new part III were modeled on provisions of part I dealing with the same subject." H. R. No. 1217, 76th Cong., 1st Sess., p. 18. In its context, the idea behind the phrase "regulatory provisions" bears on how to regulate not what is regulated. And the fact that "most" provisions were the same, not all, indicates that variations from Part I were made in Part III. When therefore we find differences in definition of the "commerce" to be regulated between Part I and Part III, it will not do to disregard them and find identity through variation. Particularly is this true when there are practical differences to account for the variation. We must first define the field of the regulation—what "commerce" between two points in the same State but going through another becomes federally regulated although theretofore free from state regulation as was rail transportation, and what "commerce" is given over to federal regulation although theretofore it was within the province of state regulation as was water transportation in a situation like that under discussion. We thus have the practical differences between water-borne and land traffic, the practical problems in the distribution between state and federal power raised by water-borne traffic on boundary streams, and the actual differences in the definitions of "commerce" in the same Act of Congress responding to these differences of fact between water-borne and land transportation. All enjoin judicial regard for these differences in the construction of the Statute.

The definition originally proposed in the Senate bill was intended to cover all three types of carrier—rail, water and motor. Particularization in this proposed definition of transportation within one State but through a second is clear proof that the *Hanley* doctrine applicable to rail carriers did not carry over to water and motor carriage. When Congress finally rejected the

all-inclusive definition proposed by the Senate and decided on separate definitions of the commerce to be regulated, it did so precisely because it realized that the legal situation as to the three types was not the same. This careful process of distinctive definition by Congress is now in effect held to have been a futile legislative endeavor. The all-inclusive definition in the original Senate bill which the Congress rejected this Court restores.

A final word. We must not be unmindful that the Committees on Interstate Commerce out of which issued this legislation have a continuity of membership which makes them well versed in the problem before us: namely, how much of the constitutional power possessed by Congress for the control of utility services should in fact be committed to the Interstate Commerce Commission. (The Chairmen of the Senate and House Committees on Interstate Commerce, who had charge of the bills that became the Transportation Act of 1940, have been members of these Committees for twenty and twenty-three years respectively.) Particularly therefore when dealing with legislation coming from these Committees and in matters involving displacement of state by federal authority, we ought not to assume that Congress did not attach significance to what it said and meant to convey that which skilled language withheld. It is more respectful of Congress to attribute to it care instead of casualness. It is certainly more consonant with judicial tradition and more conducive to legislative responsibility for courts to act on that belief.

I am therefore compelled to conclude that the Commission was not given power to regulate transportation by Cornell from one port in New York to another port in the same State.

Mr. Justice ROBERTS joins in this dissent.

SUPREME COURT OF THE UNITED STATES.

No. 385.—October Term, 1943.

Boston Tow Boat Company, Appellant, *vs.* The United States of America, Interstate Commerce Commission, et al.	On Appeal from the District Court of the United States for the Southern District of New York.

[April 3, 1944.]

Mr. Justice Black delivered the opinion of the Court.

Appellant, Boston Tow Boat Company, was an intervenor in the proceedings before the Interstate Commerce Commission leading to the Commission's decision against the Cornell Steamboat Company which we today have held was properly sustained by the District Court. *Cornell Steamboat Company* v. *United States*, No. 384. When Cornell attacked the Commission's order in the District Court, Boston again intervened. — F. Supp. —. Its petition for intervention, granted by the District Court, alleged that it operated tugboats in and about Boston harbor which rendered services somewhat similar to those rendered by Cornell in New York harbor; that Division 4 of the Commission had held it, Boston, covered by the Act; that it was aggrieved by the Commission's decision against Cornell "insofar as said decision holds that towers for hire are carriers and subject to the terms and provisions of Part III of the Interstate Commerce Act"; and that it desired to participate in the District Court proceedings "solely for the purpose of asserting . . . its said contentions regarding such jurisdictional issue." Boston's petition did not allege, and the record fails to show, that it had any financial interest in Cornell, or was engaged in competition with Cornell, or that its interests would be adversely affected by a decision against Cornell except insofar as that decision might establish a precedent holding tugboats subject to the Commission's jurisdiction under Part III of the Interstate Commerce Act. Boston's brief in this Court asserts that it has pending in the District Court for the District of Massachusetts a suit to enjoin and set aside the Commission's

order holding Boston covered by the Act. In its brief Boston expressly seeks to reserve the right to contend in the Massachusetts proceeding "that the facts underlying its own towing operations are such as to bring the question of its status outside the scope of that of a carrier."

We are of opinion that Boston's interest in the outcome of the Cornell litigation is insufficient to entitle it to take a separate appeal. See Judicial Code, §§ 210, 212, as amended, 28 U. S. C. §§ 47a, 45a. Whether Boston had sufficient interest to intervene as of right before the Commission and in the District Court we need not decide, the issue here being only whether Boston has such an "independent right which is violated" by the decision against Cornell as will support an independent appeal. *Alexander Sprunt & Son, Inc.* v. *United States*, 281 U. S. 249, 255. Clearly it has not. See *Edward Hines Trustees* v. *United States*, 263 U. S. 143; *The Chicago Junction Case*, 264 U. S. 258, 266-269; *Alexander Sprunt & Son, Inc.* v. *United States, supra*; *Pittsburg, etc., Ry. Co.* v. *United States*, 281 U. S. 479, 486-488; *Moffat Tunnel League* v. *United States*, 289 U. S. 113; cf. *Kansas City Southern Railway Company* v. *United States*, 282 U. S. 760; *L. Singer & Sons* v. *Union Pacific Railroad Co.*, 311 U. S. 295.

Appeal dismissed.